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ARTICLES

Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion

PENELOPE EILEEN BRYAN†

INTRODUCTION

Current wisdom favors the private settlement of divorce disputes. Allowing men and women to enter enforceable divorce contracts recognizes their rights-bearing citizenship,¹ honors their autonomy,² and places them on equal legal footing with one another. Moreover, the parties themselves generally prefer settlement to adjudication,

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1. See Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, in *THE RESOLUTION OF FAMILY CONFLICT: COMPARATIVE LEGAL PERSPECTIVES* 364, 366-67 (John M. Eekelaar & Sanford N. Katz eds., 1984).

2. See Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 558-59, 575 (1933) (concluding that foundation of contract law is the freedom of individuals). *But see* CAROLE PATEMAN, *THE SEXUAL CONTRACT* 39 (1988) (noting that contract theory reconstructs subjugation as freedom).

believing rightly or wrongly that an agreement reached through negotiation will better reflect their private preferences than would an adjudicated result.³ Liberal theory maintains that, unless private preferences severely compromise important state interests, the state should not interfere.⁴ Feminist theorists also observe that honoring women's freedom to contract is a step away from patriarchy, which historically considered women unsuited for autonomous decisionmaking.⁵

Practical arguments also seem to favor settlement. Settlement, some claim, promotes the efficient resolution of divorce disputes, lowering the costs of divorce for disputants⁶ and for the legal system.⁷ Proponents also argue that settlement produces results superior to those

3. See Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1350 tbl.1 (1994). Galanter and Cahill caution, however:

The existence of a general preference for settlement does not mean that the pursuit of settlement in any particular instance is an informed and uncoerced expression of such a preference. The selection of settlement in a particular instance may be based on incomplete or inaccurate information about alternatives. Or it may be based on accurate information that indicates that adjudication or other alternatives that might be preferred are so flawed that settlement, although unsatisfactory, is the best of all available evils. In some settings, lawyers spend a great deal of effort "educating" their clients about the virtues of settlement compared to the cost, uncertainty, and arbitrariness of adjudication.

Id. at 1352.

4. See generally CHARLES FRIED, *CONTRACT AS PROMISE, A THEORY OF CONTRACTUAL OBLIGATION* 2 (1981); Cohen, *supra* note 2, at 563; Debora L. Threedy, *Feminists and Contract Doctrine*, 32 IND. L. REV. 1247, 1260 (1999).

5. See DAVID L. KIRP ET AL., *GENDER JUSTICE* 21 (1986); PATEMAN, *supra* note 2, at 184. Pateman, however, exposes the inherently patriarchal nature of contract theory and cautions that feminists' entanglement with contract ultimately subverts the feminist dream. See PATEMAN, *supra* note 2, at 188.

6. See, e.g., Mnookin, *supra* note 1, at 367.

7. See Galanter & Cahill, *supra* note 3, at 1350 (acknowledging cost reduction as one justification advanced by settlement proponents). These authors simultaneously caution that settlement may reduce transaction costs for individuals at the expense of substantive justice, particularly for less advantaged persons. See *id.* at 1360-64. They also question whether the legal system actually conserves resources by promoting settlement, particularly when judges actively participate in the settlement process. See *id.* at 1364-71.

generated by adjudication.⁸ Parties, they claim, possess more information than courts and thus can make better decisions.⁹ Disputants can incorporate a wider range of values and interests than courts, generating agreements more responsive to individual needs and interests than judicial orders.¹⁰ Divorcing husbands and wives can "enhance their personhood" through respectful negotiations, rather than demean one another in the dehumanizing process of adjudication.¹¹ Moreover, by compromising or trading off their interests, spouses can avoid the destructive winner-take-all results sometimes produced by adjudication.¹² Finally, proponents claim that negotiated settlements generate greater party satisfaction and compliance than do judicial orders,¹³ an attractive argument in a system currently riddled with dissatisfaction and noncompliance.

Yet many women and children needlessly live impoverished lives after divorce,¹⁴ and settlement and

8. See Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 274 (1984).

9. See Mnookin, *supra* note 1, at 367; see also Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multi-Cultural World*, 1 J. INST. STUD. LEGAL ETHICS 49, 56-57, 60-61 (1996).

10. See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L. J. 2663, 2670, 2692 (1995); Mnookin, *supra* note 1, at 367.

11. See Menkel-Meadow, *supra* note 9, at 52 & n.20; Menkel-Meadow, *supra* note 10, at 2669-70, 2692 (arguing that settlements honor, among other things, dignity, respect, empathy, emotional catharsis, and provide the possibility of transformation); Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?*, 8 GA. ST. U. L. REV. 385 (1992) (arguing that the adversary system suppresses altruism and empathy).

12. See Galanter & Cahill, *supra* note 3, at 1351; Menkel-Meadow, *supra* note 10, at 2672-75.

13. See Galanter & Cahill, *supra* note 3, at 1350; Menkel-Meadow, *supra* note 10, at 2673.

14. See, e.g., TERRY ARENDELL, *MOTHERS AND DIVORCE: LEGAL ECONOMIC AND SOCIAL DILEMMAS* 154-56 (1986); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 323-56 (1985); Marsha Garrison, *Equitable Distribution in New York: Results and Reform: Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 720-23 tbl.55 (1991) (noting that the average post-divorce per capita income of wives and children approximates 68% of their before-divorce per capita income, whereas the per capita income of husbands increases by 182% after

default resolve approximately ninety to ninety-five percent of divorce cases,¹⁵ triggering doubts about the desirability of settlement.¹⁶

The divorce rate in the United States remains high,¹⁷

divorce); James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L. Q. 351 (1987); Robert S. Weiss, *The Impact of Marital Dissolution on Income and Consumption in Single-Parent Households*, 46 J. MARRIAGE & FAM. 115, 116-17 (1984). The post-divorce decline in standard of living affects women at all socioeconomic levels and impacts women of upper socioeconomic status most severely. See Paul R. Amato, *The Impact of Divorce on Men and Women in India and The United States*, 25 J. COMP. FAM. STUD. 207, 211 (1994).

15. See, e.g., Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 108 (1974); Robert J. Levy, *Comment on the Pearson-Thoennes Study and on Mediation*, 17 FAM. L. Q. 525, 530 (1983) (noting that 85% to 90% of divorce cases settle); Marygold S. Melli et al., *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 RUTGERS L. REV. 1133, 1142 (1988) (finding that 217 of 349 Wisconsin divorce cases settled); Mnookin, *supra* note 1, at 364 (observing that the vast majority of divorce cases are resolved by negotiation). The rate of settlement for divorce cases mimics the rate for civil cases generally. See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 27 (1983).

16. Galanter and Cahill question the arguments in favor of settlement and urge policy makers to give more attention to the quality of settlement agreements. See Galanter & Cahill, *supra* note 3, at 1351-78; see also Cohen, *supra* note 2, at 587 (arguing that the state should not use its power for unconscionable purposes, such as enforcing contracts that exploit the needs or weaknesses of certain parties); Donald J. MacDougall, *Negotiated Settlement of Family Disputes*, in THE RESOLUTION OF FAMILY CONFLICT: COMPARATIVE LEGAL PERSPECTIVES 26, 32 (John M. Eekelaar & Sanford N. Katz eds., 1984) (recognizing that none of the available methods for resolving divorce disputes adequately protect the social interests at stake).

17. In 1994, 1,191,000 marriages ended in divorce, a rate of 20.5 divorces per 1,000 married women. See Laura Gatland, *Putting the Blame on No-Fault*, 83 A.B.A. J. 50, 52 (1997) (citing The National Center for Health Statistics). In 1988, the rate was higher—37 divorces per every 1,000 married women. Nevertheless, every year since the late 1970s more than one million marriages have ended in divorce. See Patricia H. Shiono & Linda Sandham Quinn, *Epidemiology of Divorce*, 4 THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE 14, 18 (Richard E. Behrman ed., 1994). Some predict that more than one-half of all marriages in the United States will end in divorce. See, e.g., Arland Thornton, *Comparative and Historical Perspectives on Marriage, Divorce and Family Life*, 1994 UTAH L. REV. 587, 595. Some predict an

supporting the prediction that before they reach sixteen, at least forty percent of America's children will experience the divorce of their parents.¹⁸ At divorce, these children frequently experience a precipitous drop in their standard of living.¹⁹ Many sink into poverty.²⁰ This financial

even higher percentage. See Gary B. Melton, *Children, Families, and the Courts in the Twenty-First Century*, 66 S. CAL. L. REV. 1993, 2011 n.87 (1993) (stating that two out of every three first marriages will end in divorce or separation) (citing Teresa Castro Martin & Larry L. Bumpass, *Recent Trends in Marital Disruption*, 26 DEMOGRAPHY 37, 40-41 (1989)). Approximately 60% of these divorcing couples will probably have minor children. See Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553, 1555 & n.9 (1984) (citing U.S. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, SPECIAL STUDIES SERIES P-23, NO. 84, DIVORCE, CHILD CUSTODY, AND CHILD SUPPORT (1979)). Second and third marriages have even higher divorce rates, and remarried couples with children have higher rates still. See Melton, *supra*, at 2011 n.87 (citing Lynn K. White & Alan Booth, *The Quality and Stability of Remarriage: The Role of Stepchildren*, 50 AM. SOC. REV. 689 (1985)). Demographers predict that between 1988 and 2000, single-parent families headed by men will increase by 42%, and those headed by women will increase by 31%. See *id.* The percentage of married-couple families, which was 57% in 1980, is expected to decline to 47% by 2000. See *id.* Widespread concern over the high divorce rate and the consequences of divorce has led some states to consider abandoning no-fault divorce. See Gatland, *supra*, at 52.

18. See WEITZMAN, *supra* note 14, at 352; see also Frank F. Furstenberg, Jr., *History and Current Status of Divorce in the United States*, in THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE 29, 35 (Richard E. Behrman ed., 1994).

19. Beginning in 1983 Suzanne Bianchi and Edith McArthur used Census Bureau data to track 20,000 households for 32 months, interviewing members at four month intervals. Within 16 months of divorce, after adjusting for the decrease in family size, the income of the family in which the child lived dropped by 29%. See Jason DeParle, *Child Poverty Twice as Likely After Family Split, Study Says*, N.Y. TIMES, Mar. 2, 1991, § 1, at 8; see also SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY 4 (1989) (stating that approximately 65% of single-parent families result from marital separation or divorce) (citing U.S. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, CURRENT POPULATION REPORTS, HOUSEHOLD AND FAMILY CHARACTERISTICS, at 79 (1987)); WEITZMAN, *supra* note 14, at 352-56; Ruth A. Brandwein et al., *Women and Children Last: The Social Situation of Divorced Mothers and Their Families*, 36 J. MARRIAGE & FAM. 498, 500 (1974) (explaining that financial difficulties plague most single-mothers); Mary Corcoran et al., *The Economic Fortunes of Women and Children: Lessons from the Panel Study of Income Dynamics*, 10 SIGNS 232, 240-41, 244, 247 (1984); E. Mavis Hetherington et al., *Marital Transitions: A Child's Perspective*, 44 AM. PSYCHOL. 303, 305 (1989) (stating that approximately 90% of divorced children live with a single-parent mother); Leslie N. Richards

deprivation inhibits their academic, social, and psychological development.²¹ Many children become

& Cynthia J. Schmiede, *Problems and Strengths of Single-Parent Families: Implications for Practice and Policy*, 42 FAM. REL., 277-278, 280 (1993) (noting that single-parents head approximately 25% of American families and stating that women head 87% of single-parent families). See generally, e.g., LESLIE A. MORGAN, AFTER MARRIAGE ENDS: ECONOMIC CONSEQUENCES FOR MIDLIFE WOMEN (1991).

20. In their study described in note 19, Bianchi and McArthur found that children are nearly twice as likely to live in poverty after a divorce than before; specifically, the percentage of impoverished children increased from 19% to 36% within four months of divorce. See DeParle, *supra* note 19, § 1, at 8; see also, e.g., ARENDELL, *supra* note 14, at 153-57; CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN 23, 25 (1991) (showing that approximately one in five children in the United States lives in poverty, one in two children living in a female-headed, one-parent home lives in poverty, and that approximately one in ten children living with both parents lives in poverty); Jay D. Teachman & Kathleen M. Paasch, *Financial Impact of Divorce on Children and Their Families*, 4 THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE 63 (Richard E. Behrman ed., 1994); .

21. For example, in a two-year study of a random nationwide sample of 699 elementary grade children, Guidubaldi and Perry found that divorced children performed more poorly on nine of 30 mental health measures than children from intact families. For example, divorced children evidenced higher frequencies of dependency, irrelevant talk, withdrawal, blaming, inattention, decreased work effort, inappropriate behavior, unhappiness, and maladaptive symptoms. When the researchers controlled for income level of custodial households, the group of divorced children scored differently on only two mental health measures. Boys from divorced homes, however, performed lower on four mental health measures than boys from intact families. The only difference remaining between girls from divorced homes and girls from intact families concerned internal locus of control, a self-esteem measure. Girls from divorced households actually exhibited higher internal locus of control than did girls from intact families. See John Guidubaldi & Joseph D. Perry, *Divorce and Mental Health Sequelae for Children: A Two-Year Follow-Up of a Nationwide Sample*, 24 J. AM. ACAD. CHILD PSYCHIATRY 531, 533-34 (1985); see also WEITZMAN, *supra* note 14, at 354; Alan C. Acock & K. Jill Kiecolt, *Is it Family Structure or Socioeconomic Status? Family Structure During Adolescence and Adult Adjustment*, 68 SOC. FORCES 553, 556-57 (1989); David H. Demo, *Parent-Child Relations: Assessing Recent Changes*, 54 J. MARRIAGE & FAM. 104, 110 (1992); Hetherington et al., *supra* note 19, at 304 (citations omitted) (reporting that the most common problems of divorced children are aggression, non-compliance, acting-out behaviors, decreases in prosocial behavior, poorer academic achievement and school adjustment, and disruptions in peer and heterosexual relations); William F. Hodges et al., *The Cumulative Effect of Stress on Preschool Children of Divorced and Intact Families*, 46 J. MARRIAGE FAM. 611, 614 (1984) (explaining that children of divorced families with

depressed²² and perform more poorly at school,²³

inadequate income had substantially higher levels of anxiety and depression); Lawrence A. Kurdek, *An Integrative Perspective on Children's Divorce Adjustment*, 36 AM. PSYCHOL. 856, 858, 860 (1981); Judith A. Seltzer, *Consequences of Marital Dissolution for Children*, 20 ANN. REV. SOC. 235, 244 (1994). Despite the overwhelming number of studies identifying the ways that divorce harms many children, a cautionary note seems appropriate. Some of the negative research findings on divorced children come from populations of children in therapy. Moreover, many early studies do not compare the findings on divorced children to findings on children from intact families. Others fail to control for socioeconomic variables or assess the effects on children of their downward financial mobility. See ARENDELL, *supra* note 14, at 88. Some studies suggest that many of the negative symptoms of divorced children existed prior to the divorce. See, e.g., Jeanne H. Block et al., *The Personality of Children Prior to Divorce: A Prospective Study*, 57 CHILD DEV. 827 (1986); Hetherington et al., *supra* note 19, at 304-05; J. M. Jenkins & M. A. Smith, *A Prospective Study of Behavioural Disturbance in Children Who Subsequently Experience Parental Divorce: A Research Note*, 19 DIVORCE & REMARRIAGE, 143 (1993). *But cf.*, ARENDELL, *supra* note 14, at 81 (finding that children from abusive households especially may prosper in their less stressful post-divorce homes); Demo, *supra*, at 110; Guidubaldi & Perry, *supra*, at 531 (stating that some children respond well to divorce); Hetherington et al., *supra* note 19, at 304 (citations omitted) (explaining that researchers consistently find that children adapt better in a well-functioning single-parent family than in a conflict-ridden two-parent family); Seltzer, *supra*, at 239. Nevertheless, result replication and more recent methodological refinements have confirmed that many divorced children suffer as noted in this text. *But see* Seltzer, *supra*, at 239-40. Even divorced mothers who express outrage at the negative stereotypes of divorced children also recognize the hardships their children experience as a result of financial impoverishment. See ARENDELL, *supra* note 14, at 49, 100-01; NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES 25-27 (1997).

22. See Hodges et al., *supra* note 21, at 614 (explaining that children of divorced families with inadequate income had substantially higher levels of anxiety-depression).

23. See ARENDELL, *supra* note 14, at 124-26; Seltzer, *supra* note 21, at 238. One researcher, for instance, found that children in single-mother and in single-father households performed equally well in school, but that both groups performed more poorly than did children from intact families. Economic deprivation explained the poor performance of children in single-mother households, whereas interpersonal deprivation explained the poor performance of children in single-father households. See Douglas B. Downey, *The School Performance of Children From Single-Mother and Single-Father Families*, 15 J. FAM. ISSUES 129, 144-45 (1994); see also Sara McLanahan, *Family Structure and the Reproduction of Poverty*, 90 AM. J. SOC. 873, 888-89, 897 (1985) (finding that the economic deprivation of white children living in single-mother households substantially

compromising their success.²⁴ Inadequate food,²⁵ housing,²⁶ and medical care²⁷ threaten children's physical health. Many divorced children²⁸ grow angry and bitter at the financial discrepancy between their homes and the homes

decreased the children's success in school).

24. Divorced children attain lower levels of educational and economic achievement than children raised in intact families. See DOWD, *supra* note 21, at 25-26; JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN & CHILDREN A DECADE AFTER DIVORCE* 160 (1989) (noting that divorce chills the hopes, aspirations, and achievements of children); see also Paul R. Amato & Bruce Keith, *Separation from a Parent during Childhood and Adult Socioeconomic Attainment*, 70 SOC. FORCES 187, 193-98, 200, 202-03 (1991); Verna M. Keith & Barbara Finlay, *The Impact of Parental Divorce on Children's Educational Attainment, Marital Timing, and Likelihood of Divorce*, 50 J. MARRIAGE & FAM. 797, 798-99 (1988); Sheila Fitzgerald Krein & Andrea H. Beller, *Educational Attainment of Children From Single-Parent Families: Differences by Exposure, Gender, and Race*, 25 DEMOGRAPHY 221, 222-24 (1988).

25. Consider, for example, the voices of mothers in Weitzman's study:

We ate macaroni and cheese five nights a week. There was a Safeway special for 39 cents a box. We could eat seven dinners for \$3.00 a week. . . . I think that's all we ate for months. I applied for welfare. . . . It was the worst experience of my life. . . . I never dreamed that I, a middle class housewife, would ever be in a position like that. It was humiliating . . . they make you feel it. . . . But we were desperate, and I *had* to feed my kids. You name it, I tried it—food stamps, soup kitchens, shelters. It just about killed me to have the kids live like that. . . . I finally called my parents and said we were coming . . . we couldn't have survived without them.

WEITZMAN, *supra* note 14, at 339. Another mother observes:

In addition to scaled-down budgets for food ("We learned to love chicken backs") and clothing ("At Christmas I splurged at the Salvation Army—the only "new" clothes they got all year"), many spoke of cutting down on their children's school lunches ("I used to plan a nourishing lunch with fruit and juice; now she's lucky if we have a slice of ham for a sandwich") and school supplies and after-school activities ("he had to quit the Little League and get a job as a delivery boy").

Id. at 340.

26. See Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2233-34 (1994).

27. See ARENDELL, *supra* note 14, at 17, 40; PETER J. CUNNINGHAM & BETH A. HAHN, 4 THE FUTURE OF CHILDREN: CRITICAL HEALTH ISSUES FOR CHILDREN AND YOUTH 24 (1994).

28. Throughout the article the term divorced children refers to children of divorced parents.

of their fathers.²⁹ Multiple moves, undertaken for economic reasons, deprive children of familiar peers, neighborhoods, and schools.³⁰ Divorced children's diminished financial circumstances oftentimes depress their social status and their self-esteem,³¹ and they may join more marginal groups of children.³² Criminal behavior increases.³³ Divorced children from middle class families frequently receive no financial assistance for college, and consequently do not

29. See JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* 231 (1980); WEITZMAN, *supra* note 14, at 353; Seltzer, *supra* note 21, at 244.

30. See DOWD, *supra* note 21, at 26; see also WALLERSTEIN & KELLY, *supra* note 29, at 183; Seltzer, *supra* note 21, at 245. High degrees of environmental change also correlate with children's depression, social withdrawal, aggression, and delinquency. See Kurdek, *supra* note 21, at 858.

31. A mother in Terry Arendell's study, for instance, reports:

I had \$950 a month, and the house payment was \$760, so there was hardly anything left over. So there we were: my son qualified for free lunches at school. We'd been living on over \$4,000 a month, and there we were. That's so humiliating. What that does to the self-esteem of even a child is absolutely unbelievable. And it isn't hidden; everybody knows the situation. They knew at his school that he was the kid with the free lunch coupons. . . . My son is real tall and growing. I really didn't have any money to buy him clothes, and attorneys don't think school clothes are essential. So he was wearing these sweatshirts that were too small for him. Then one day he didn't want to go to school because the kids had been calling him Frankenstein because his arms and legs were hanging out of his clothes—they were too short. That does terrible things to a kid, it really does. We just weren't equipped to cope with it.

ARENDELL, *supra* note 14, at 49.

32. Melton notes, "poverty accounts for the greatest portion of variance in community rates of delinquency and child maltreatment, neighborhood quality accounts for much of the remainder." Melton, *supra* note 17, at 2003 (citations omitted).

33. See DOWD, *supra* note 21, at 25-26 (noting that poverty in single-parent families correlates with children's criminal activity); Demo, *supra* note 21, at 110; Seltzer, *supra* note 21, at 238. In the United States, more than 70% of all juveniles in state reform institutions come from fatherless homes. After controlling for income, boys from single-mother homes are significantly more likely than others to commit crimes that place them in the criminal justice system. The relationship between crime and one-parent families is so strong that when family configuration is controlled, the relationship between race and crime and between low income and crime disappears. See Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 LOY. U. CHI. L.J. 321, 329 (1996) (citing Barbara D. Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY, Apr. 1993).

go.³⁴ Divorced children whose economic situations do improve over time typically face years of interim hardship.³⁵ They cannot reclaim the potential lost during those years.³⁶

Many divorced children live with financially and logistically stressed single parents who become less available to the children than before the divorce.³⁷ Not only must these children adjust to less contact with non-

34. Most of the youngsters in Wallerstein and Blakeslee's study came from middle-class families where one or both parents had college degrees, and most of the children attended high schools where 85% of all students went to college. Yet, at ten-year follow-up interviews, only one-half of the divorced children were attending or had completed a two-year or four-year college. One-third of them, including many highly intelligent children, had dropped out of high school or college. Of the children attending college, only one in ten received full financial support from one or both parents. Others received no help at all or only limited financial help—even from wealthy fathers who could afford to help much more. Among the fathers in the study who could afford to help with college expenses, only one-third assisted their children. Two-thirds provided no help. See WALLERSTEIN & BLAKESLEE, *supra* note 24, at 156; see also ARENDELL, *supra* note 14, at 25, 44; WEITZMAN, *supra* note 14, at 353; Barbara Grissett & L. Allen Furr, *Effects of Parental Divorce on Children's Financial Support for College*, 22 J. DIVORCE & REMARRIAGE 155, 159-61 (1994) (finding that divorced children attending college received significantly less parental financial support than children from intact families and that the custodial parent likely provided whatever support they did receive); Barbara Bennett Woodhouse, *Towards a Revitalization of Family Law*, 69 TEX. L. REV. 245, 269 (1990).

35. When their mothers remarry, the financial situation of divorced children generally improves. See Hetherington et al., *supra* note 19, at 307 (citations omitted). More than one-half of the children whose parents divorce, however, spend at least six years with only one parent. See Demo, *supra* note 21, at 109.

36. See WEITZMAN, *supra* note 14, at 352-54. A highly intelligent child, for instance, might perform poorly in school for three of his four high-school years because of stress and depression caused by his family's financial hardship. Even if his custodial mother improves the family's financial position by remarrying at the end of his junior year, he cannot change his earlier grades. His choice of college becomes restricted, and he may not achieve what he could have achieved had his family remained economically sound.

37. See, e.g., ARENDELL, *supra* note 14, at 61-68, 155-56; DOWD, *supra* note 21, at 26; Paul R. Amato & Sonia Partridge, *Widows and Divorcees with Dependent Children: Material, Personal, Family, and Social Well-Being*, 36 FAM. RELATIONS 316, 316 (1987); Nancy Donohue Colletta, *Stressful Lives: The Situation of Divorced Mothers and Their Children*, 6 J. DIVORCE 19, 23-27 (1983); Demo, *supra* note 21, at 110-11; Hetherington et al., *supra* note 19, at 308; Richard & Schmiede, *supra* note 19, at 280 fig.6.

custodial parents,³⁸ they also must cope with the diminished capacity³⁹ and availability of the custodial parent.⁴⁰

The logistical strains on their households force many divorced children to assume adult responsibilities,⁴¹ sometimes compromising their academic achievement and their social development. Moreover, many children are caught in the hostile cross-fire between parents⁴² and some

38. Some non-custodial fathers find intermittent parenting painful and withdraw from their children, and most non-custodial fathers rapidly become less available to their children. See Hetherington et al., *supra* note 19, at 309; Seltzer, *supra* note 21, at 254-55, 258; Judith S. Wallerstein & Shauna B. Corbin, *Father-Child Relationships After Divorce: Child Support and Educational Opportunity*, 20 FAM. L.Q. 109, 114 (1986); see also ARENDELL, *supra* note 14, at 109-24. Non-custodial fathers become even less available after they remarry. See Hetherington et al., *supra* note 19, at 309.

39. See DOWD, *supra* note 21, at 26-27; Seltzer, *supra* note 21, at 254; Judith S. Wallerstein, *The Overburdened Child: Some Long-Term Consequences of Divorce*, 30 SOC. WORK 116, 117 (1985).

40. See ARENDELL, *supra* note 14, at 81-82; WALLERSTEIN & KELLY, *supra* note 29, at 25; WEITZMAN, *supra* note 14, at 319; Hetherington et al., *supra* note 19, at 304. Successful adjustment, however, usually does occur. See ARENDELL, *supra* note 14, at 82-88; Kurdek, *supra* note 21, at 859-60.

41. See ARENDELL, *supra* note 14, at 91-92; Hetherington et al., *supra* note 19, at 305, 308. While the early assumption of responsibilities can lead to maturity, approximately one-third of older children and adolescents disengage from their families. See Hetherington et al., *supra* note 19, at 305. If these disengaged children become involved in pro-social peer groups, academic achievement, or constructive relationships, their disengagement can be a positive coping mechanism. On the other hand, if these disengaged children become involved with anti-social groups and activities without adult monitoring, destructive results can occur. See *id.*

42. See ARENDELL, *supra* note 14, at 106, 123-27 (explaining that children frequently suffer when divorced parents remain hostile). Many studies establish that intense conflict between divorced parents strongly correlates with children's poor adjustment to divorce. See, e.g., Christy M. Buchanan et al., *Adolescents and Their Families After Divorce: Three Residential Arrangements Compared*, 2 J. RES. ADOLESCENCE 261, 287-88 (1992); Andre P. Derdeyn & Elizabeth Scott, *Joint Custody: A Critical Analysis and Appraisal*, 54 AM. J. ORTHOPSYCHIATRY 199, 204 (1984); Denise Donnelly & David Finkelhor, *Does Equality in Custody Arrangements Improve the Parent-Child Relationship?*, 54 J. MARRIAGE & FAM. 837, 843-44 (1992); Hetherington et al., *supra* note 19, at 307; Marsha Kline et al., *The Long Shadow of Marital Conflict: A Model of Children's Postdivorce Adjustment*, 53 J. MARRIAGE & FAM. 297 (1991); Seltzer, *supra* note 21, at 253-54. Despite an abundance of research confirming the negative effects of parental conflict on children, courts continue to order children into joint physical

are forced to visit with those who have abused them,⁴³ stressing further their emotional reserves. Worse yet, the custody of some children is given to those who have abused them⁴⁴—or to those who have abused their mothers.⁴⁵

custody arrangements with hostile parents. See Robert H. Mnookin et al., *Private Ordering Revisited: What Custodial Arrangements are Parents Negotiating?*, in *DIVORCE REFORM AT THE CROSSROADS* 37, 54 (Stephen D. Sugarman & Herma Hill Kay eds., 1985).

43. See REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT, COMMONWEALTH OF MASSACHUSETTS 69-70 (1989) [hereinafter MASSACHUSETTS GENDER BIAS REPORT]; *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803, 867 (1990) [hereinafter *Florida Gender Bias Report*]; *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 513, 567 (1993) [hereinafter *Missouri Gender Bias Report*]. Court cases provide numerous examples. In a Massachusetts case, for instance, the court granted visitation rights to a father who fired a gun into the home of his ex-girlfriend, killed her friend, and was charged with attempted murder of his child. In another Massachusetts's case the court asked a man who pled guilty to raping a woman whether he wanted visitation rights to the child conceived as the result of the rape. See MASSACHUSETTS GENDER BIAS REPORT, *supra*, at 69. In a Florida case a father, uncle, and grandfather sexually assaulted a five-year-old girl in front of her eight-year-old brother. The past president of the board of Women in Distress stated:

[I]t took us 18 months—this happened in the last two years—18 months to be able to stop the man from visitation rights[,] during which time he continued to abuse the child. . . . But the judge said to me: "Do you as a counselor, do you as a professional, believe that this child [has been abused]" — "[Y]es, absolutely." She said, "[O]kay, thank you," and went ahead and let him visit her alone.

Florida Gender Bias Report, *supra*, at 867. For numerous reasons, negotiated settlements reflect this pattern. An abused mother, for instance, may agree to a custody or visitation arrangement that fails to protect her and her child because she fears losing custody altogether. See *infra* notes 298-408, and accompanying text. Moreover, guardians ad litem and custody evaluators frequently disbelieve or minimize a mother's allegations of abuse. They consequently may recommend that the alleged perpetrator receive custody. With no support from these professionals, the mother may agree to generous visitation in order to avoid losing custody altogether.

44. One Missouri attorney observed: "Judges and attorneys have difficulty believing sex abuse allegation by women and children and sometimes place children back with abusers. In a recent case, the male guardian ad litem didn't want to believe allegations of sex abuse against the father because he seemed like a nice guy." *Missouri Gender Bias Report*, *supra* note 43, at 568. Court cases provide additional examples. In one case, the Massachusetts Department of Social Services substantiated the mother's allegations of child sexual abuse of the

The suffering and lost potential of divorced children should themselves prompt humanist concern. A more selfish concern, however, also is warranted. We all suffer when the results reached in divorce settlements compromise the physical and mental health, and the academic achievement of these children. They may not grow into productive and responsible citizens. Even if they do, their full potential may remain undeveloped.⁴⁶ Sometimes they become embittered, dysfunctional adults, unable to help themselves or contribute to our collective well being.⁴⁷ Likewise, we all suffer when many divorced children engage in criminal behavior. The cost of policing and punishing juvenile offenders keeps rising. And some of us, undoubtedly, will become their victims.

We not only lose the potential of our children, we also needlessly harm many divorced women. Women, trapped in the poverty or economic deprivation that frequently follows divorce,⁴⁸ have difficulty obtaining the job experience and

daughter by the father. *See In re A.F. v. N.F.*, 549 N.Y.S.2d 511, 513 (N.Y. App. Div. 1989). The trial court ignored this and other evidence of sexual abuse, and awarded custody to the father. *See id.* at 513, 514. In a rare moment, the appellate court substituted its judgment for that of the trial court, ordering that custody be returned to the mother, and that the father have only supervised visitation with the child. *See id.* at 513, 515.

45. *See* PHYLLIS CHESLER, *MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY* 81 (1987) (finding that 59% of the fathers who won custody in litigation and 50% of the fathers who obtained custody through private negotiations had abused their wives).

46. *See* Henrik H.H. Andrup, *Divorce Proceedings: Ends and Means, in THE RESOLUTION OF FAMILY CONFLICT: COMPARATIVE LEGAL PERSPECTIVES* 163, 166 (John M. Eekelaar & Sanford N. Katz eds., 1984); *see also* DOWD, *supra* note 21, at 17 (acknowledging that our punitive approach to children who live in single-parent families is socially destabilizing).

47. *See* Donald S. Moir, *No Fault Divorce and the Best Interests of Children*, 69 DENV. U. L. REV. 663, 672 (1992) (noting that if Wallerstein and Kelly are correct that more than one third of divorced children are chronically impaired, and if 50% of our children experience the divorce of their parents, then one-sixth of our population will face a disabled adulthood because of divorce).

48. *See* MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 19; MORGAN, *supra* note 19; WEITZMAN *supra* note 14; Brandwein et al., *supra* note 19, at 500; Corcoran et al., *supra* note 19, at 240-41, 244, 247; Peggy S. Draughn, *Divorcees' Economic Well-Being and Financial Adequacy as Related to Interfamily Grants*, 22 J. DIVORCE & REMARRIAGE 23, 24-25 (1994) (citing numerous studies establishing that women's economic well-being suffers more than men's at divorce).

education that would help them contribute as much as they could to themselves,⁴⁹ their children, and society.⁵⁰ Many divorced mothers struggle to find work and make ends meet.⁵¹ Not all succeed.⁵² Financial desperation keeps many women trapped in low-paying jobs.⁵³ Rising numbers of

49. See ARENDELL, *supra* note 14, at 50-51; DOWD, *supra* note 21, at 22.

50. In her study of 60 divorced mothers, Terry Arendell found that ten mothers did not experience serious depression or despair after divorce. She comments:

But the reasons they gave simply reemphasize the central importance of economic loss in the lives of divorced women. Four of these ten had various sources of income that protected them from poverty and enabled them to work actively toward improving their situation. Two of them were using income from the divorce property settlement to attend graduate school, and they hoped to regain their former standard of living by pursuing professional careers. Two were receiving financial support from their parents while they sought employment and planned for the possible sale of their homes as part of the property settlement. The remaining six said they were generally optimistic *in spite of* their poor economic positions. Like the others, they found the financial hardships imposed by divorce surprising and difficult to handle; they simply found these hardships easier to cope with than the despair they had known in their marriages.

ARENDELL, *supra* note 14, at 51.

51. See *id.* at 53-79. Seventy-eight percent of the single-parent mothers studied by Richards and Schmiede identified financial difficulties as a major problem. All of these single-parent mothers came from middle class backgrounds. One mother who remarried quickly noted "[f]inancially it got pretty bad towards the end. It was like I was selling a lot of our stuff like the freezer, and whatever else we had, just to keep going. It was a trying time." Richards & Schmiede, *supra* note 19, at 280. In contrast, only two of the 11 single-parent fathers in their study mentioned financial problems. One of these fathers complained that he had to reinvest too quickly in order to avoid capital gains tax. See *id.*

52. One study found that prior to divorce, 33% of wives worked full time. At four months and at one year after divorce, the percentage of divorced women working full time was 41%. The study also indicated that, within four months of divorce, wives who had not worked during the marriage had found part-time employment, decreasing wives' overall unemployment rate from 43% to 31%. This change did not last, however. Within a year of divorce ex-wives' unemployment rate had returned to 43%. See DeParle, *supra* note 19.

53. See ARENDELL, *supra* note 14, at 55-61; DOWD, *supra* note 21, at 19-22; MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 33. Arendell notes that of the 60 mothers she interviewed:

[B]eing underemployed was common: nearly a third of the women

divorced mothers must hold two jobs to survive.⁵⁴ Their financial worries compromise their physical and emotional health⁵⁵ as well as their parenting skills.⁵⁶ Their anger at

doing clerical work had college degrees, as did the one blue-collar worker. One woman earned over \$2,000 a month and another less than \$600, but these extremes were the exception. The majority had net incomes of between \$800 and \$1,200 a month, or \$9,600 to \$14,400 a year.

ARENDELL, *supra* note 14, at 56. The mothers' dependency on their meager earnings made them reluctant to ask for higher wages. *See id.* at 59.

54. *See* Peter T. Kilborn, *For Many Women, One Job Just Isn't Enough*, N.Y. TIMES, Feb. 15, 1990, at A1. *See also* ARENDELL, *supra* note 14, at 63-64.

55.

Data from national samples consistently document the disruptive effects of divorce on the mental and physical health of both sexes. . . . [D]ivorced men and women exhibit more symptoms (such as "nervous breakdown" and "inertia"), and in more serious degree, than do persons of other marital statuses. Divorced and separated people have the highest admission rates to psychiatric facilities (compared to married, widowed, and never married people) . . . Divorced people have more illness, higher mortality rates (in premature deaths), higher suicide rates, and more accidents than those who are married. In fact, the marital status of a person is one of the best predictors of his or her health, disease, and death profile. While both sexes "share" some of the psychic and physical distress of divorce, women seem to experience the greater stress and their stress seems to take a higher toll. Beyond question, much of the women's stress is attributable to their economic condition. This is to be expected in light of the well-known relationship between low socioeconomic status and both mental and physical illness. Three decades of research have shown a strong correlation between low income and both stress and psychiatric disability. Having a low socioeconomic status and being a single mother is "additively and cumulatively associated with physical morbidity among mothers."

WEITZMAN, *supra* note 14, at 349-50 (citations omitted); *see also* ARENDELL, *supra* note 14, at 46-52, 61-63; Hetherington et al., *supra* note 19, at 307-08; Gay C. Kitson & Leslie A. Morgan, *The Multiple Consequences of Divorce: A Decade Review*, 52 J. MARRIAGE & FAM. 913, 913-14 (1990). *But see* WEITZMAN, *supra* note 14, at 345-49 (stating that within a year of their divorce women and men report higher self-esteem and competence); Alan Booth & Paul Amato, *Divorce and Psychological Stress*, 32 J. HEALTH & SOC. BEHAVIOR 396, 400-05 (1991) (illustrating that two years after divorce psychosomatic symptoms, depression, and unhappiness of divorced persons become comparable to those of married persons).

56. *See generally* ARENDELL, *supra* note 14, at 49, 90, 93-101; Hetherington et al., *supra* note 19, at 308. *But see* Richards & Schmiede,

ex-husbands mounts as they and their children go without resources and opportunities that they once had—and that the ex-husband often retains.⁵⁷

Perhaps we do not take the plight of divorced women seriously because we expect them to recover.⁵⁸ Some women, of course, do manage to improve their financial situation by obtaining education, training,⁵⁹ or higher paying jobs, or by increasing their work hours.⁶⁰ Yet the financial desperation of many others induces them to take whatever low-paying jobs they can find.⁶⁰ Many women under thirty, and some women under forty, remarry⁶¹ and improve their financial positions.⁶² Yet they, like their children, face interim years of hardship that compromise their lives.⁶³ Moreover, many

supra note 19, at 281 (finding that many single parents take pride in their parenting skills and in their ability to communicate well with their children).

57. See ARENDELL, *supra* note 14, at 40-41, 44, 46-52; WALLERSTEIN & KELLY, *supra* note 29, at 231; WEITZMAN, *supra* note 14, at 347, 353; see also MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 33 (noting the lifestyle differences between middle-aged (40 to 50 year-old) women and their ex-husbands).

58. See WEITZMAN, *supra* note 14, at 150 (explaining how a Los Angeles judge stated that he "[w]ould think she is entitled to some severance pay... that's probably not the right terminology but something to give her an opportunity to have a year or two where she's not hurting and maybe she'll find some other doctor to marry her and/or get a chance to try to get herself reoriented to her new status"); MORTON DEUTSCH, *DISTRIBUTIVE JUSTICE: A SOCIAL-PSYCHOLOGICAL PERSPECTIVE* 59 (1985) (explaining that the belief that a victim's situation will improve can inhibit action to assist the victim).

59. See generally ARENDELL, *supra* note 14, at 44-45; 51.

60. See *id.* at 55-59.

61. See ARENDELL, *supra* note 14, at 142-45 (explaining that many divorced women, however, express extreme ambivalence about remarriage); Paul C. Glick & Sung-Ling Lin, *Recent Changes in Divorce and Remarriage*, 48 J. MARRIAGE & FAM. 737, 739-44 (1986); Richards & Schmiede, *supra* note 19, at 278 (finding in their study of 60 single parents from middle class backgrounds, that 57% of the women and 55% of the men had remarried).

62. See Hetherington et al., *supra* note 19, at 307 (citations omitted) (finding that remarriage tends to improve the financial status of single-parent mothers and their children, although the new family faces other difficult issues).

63. See ARENDELL, *supra* note 14, at 46-52; MORGAN, *supra* note 19, at 131-33, 134-42 (finding that in addition to interim hardship, remarriage does not guarantee that a woman will improve her financial well-being).

divorced women never remarry⁶⁴ or remarry out of economic desperation⁶⁵ and enter into poor relationships with men who abuse them and/or their children.⁶⁶ Many remarriages end in divorce, perpetuating the cycle and again disrupting the children's lives.⁶⁷ Many women and their children do not recover from the financial hardships of divorce.⁶⁸ Settlement contributes to these results and deserves closer scrutiny.⁶⁹

This article explains why many wives enter unfair divorce settlements. It first explores the context in which wives negotiate divorce contracts. Part I describes the financial, social, and psychological circumstances that create an unlevel playing field upon which wives must bargain. Part II reveals how indeterminate divorce law, grounded in norms of patriarchy, individualism, and formal equality, contributes to the uneven playing field. Part III explores the role that lawyers play in inducing wives to enter unfair settlement agreements and the unwillingness of trial judges to intercept and alter unfair provisions. In the end, coercive and unequal social conditions,⁷⁰ rather

64. See ARENDELL *supra* note 14, at 144; MORGAN, *supra* note 19, at 125, 128.

65. See ARENDELL *supra* note 14, at 143; see also MORGAN, *supra* note 19, at 35-38; Glick & Lin, *supra* note 61, at 743 (speculating that the greater financial needs of divorced women with children likely encouraged them to remarry more quickly than their childless counterparts). But see MORGAN, *supra* note 19, at 141.

66. See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, CHAPTER 5: COMPENSATORY SPOUSAL PAYMENTS 392-93 (Tentative Draft No. 2, 1996) [hereinafter CHAPTER 5].

67. See MORGAN, *supra* note 19, at 139-40; Hetherington et al., *supra* note 19, at 303 (explaining that children require a longer period to adjust to the remarriage of their custodial parents than to the initial divorce); Melton, *supra* note 17, at 2011 n.87 (stating that remarried couples with children show an even higher rate of divorce than remarried couples without children) (citing Lynn K. White & Alan Booth, *The Quality and Stability of Remarriage: The Role of Stepchildren*, 50 AM. SOC. REV. 689 (1985)). Because divorce occurs more rapidly in remarriages, sometimes a child confronts a second divorce before adapting to the remarriage.

68. See ARENDELL, *supra* note 14, at 44-45, 50-52; MORGAN, *supra* note 19, at 27.

69. A few settlement advocates recognize that some limits on the enforceability of divorce agreements might be appropriate. See, e.g., Mnookin, *supra* note 1, at 370.

70. See ALAN WERTHEIMER, COERCION 184-88 (1987); Alan Wertheimer, *Remarks on Coercion and Exploitation*, 74 DENV. U. L.

than the free exercise of individual will, explain why wives routinely enter unfair divorce settlements.

Wives who realize the injustice they have suffered can petition the court to set aside or vacate unfair agreements if they have the necessary emotional and financial resources to do so. Part IV notes that these petitions normally fail, primarily because contract doctrine fails to comprehend—and sometimes perverts—women's experiences during marriage and during divorce negotiations. Part IV illustrates that divorce settlements, contrary to popular wisdom, frequently restrict rather than enhance women's life choices by leaving them impoverished and embittered. The paper concludes with the suggestion that judges should not privilege divorce contracts. Instead they should scrutinize them carefully and refuse to accept unfair settlements. Even after judges accept agreements at final hearing, they should remain willing to review and to set aside or vacate those that, in retrospect, seem unfair.

I. PRACTICAL, PSYCHOLOGICAL, AND SOCIAL IMPEDIMENTS CONFRONTING WOMEN IN DIVORCE NEGOTIATIONS

To understand how wives are induced to enter unfair agreements, one must know something of the situation of wives at divorce. In this section, when I speak of women and their circumstances, I necessarily speak in statistical generalities that may not apply to any particular woman. I thus risk the "essentialist error"—the assumption that all women are, at their core, somehow the same, or the assumption that generalizations capturing the concern of high-status white women necessarily capture the concerns of all women.⁷¹ While I recognize this risk, I believe it must be taken. Silence bred by fear of essentialism threatens to leave women without the collective voice required for change.⁷² Moreover, the patterns discussed in this paper

REV. 889, 895-901 (1997).

71. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585, 588 (1990). See generally ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245-51 (1991).

72. See Williams, *supra* note 26, at 2247-48 ("But this fear of

capture the experiences of far too many divorced women, without denying that race, class, and other categories may compound or fundamentally alter the problem.

I also reject the conception of wives as formal equals to their husbands. Rather, I describe how wives tend to differ from their husbands at divorce and show how those differences disadvantage them during negotiations.⁷³ Portraying women as victims in a coercive context poses risks.⁷⁴ These risks seem justified, however, in order to expose how "patriarchal subordination"⁷⁵ contaminates women's "freedom" to contract at divorce and to challenge the legal system's blind preference for private settlement.⁷⁶

essentialism, with which I am in full sympathy, should not prevent us from painting vivid word pictures of predominant sociological patterns."); see also OKIN, *supra* note 19, at 6-7; PATEMAN, *supra* note 2, at 17-18; Crenshaw, *supra* note 71, at 1241 ("[O]ver the last two decades, women have organized against the almost routine violence that shapes their lives. Drawing from the strength of shared experience, women have recognized that the political demands of millions speak more powerfully than the pleas of a few isolated voices. This politicization in turn has transformed the way we understand violence against women."); Harris, *supra* note 71, at 586, 607.

73. In so doing, I hope to challenge law's "tendency to privilege the abstract and unitary voice," of a masculine law that ignores or perverts the experience of many women. Harris, *supra* note 71, at 585. As Crenshaw notes: "[T]he social power in delineating difference need not be the power of domination; it can instead be the source of social empowerment and reconstruction." Crenshaw, *supra* note 71, at 1242.

74. Portraying women as victims can obscure women's efforts to escape oppression, inaccurately depicting their reality and denying their strength. The legal system may respond negatively to women labeled "victims," perhaps by finding them unfit custodians of their children. Finally, women may internalize the stereotype of victim, discouraging their resistance to oppression. See PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT* 67-114 (1991) (describing Black women's struggle to avoid internalizing negative cultural stereotypes about them specifically and about beauty generally); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995).

75. See PATEMAN, *supra* note 2, at 17 (arguing that ignoring sexual differences presupposes that the concepts of the civil (public) realm and the individual are "uncontaminated by patriarchal subordination").

76. As I have written elsewhere:

[I] choose to recognize, rather than ignore, the burdens under which women labor in their struggle for equality. In no manner does this . . . imply women's inferiority. The hostile world in which women live, not women's inherent weaknesses, creates each of the . . . differences I describe. . . . Moreover, those who

I, in no way, however, mean to portray all divorcing women as passive victims who lack the agency necessary to pursue their interests. Rather, I simply recognize that many women's socialized subordination to male dominance discourages them from acting in their own best interests. I also note that contextual constraints severely impede the success of the women who do assertively pursue their interests at divorce. Rather than stigmatize women as victims, I hope this reinterpretation of women's freedom to contract will expose an inherently coercive practice and encourage divorcing women to resist their socialized acquiescence to male dominance and the coercive context of divorce.⁷⁷

A. Financial Dependency

I first turn to the financial world of wives at divorce. Women's caregiving responsibilities almost inevitably constrain their participation in the marketplace.⁷⁸ Moreover, women who work outside the home face continuing discrimination that often confines them to jobs with low income and prestige, depressing their earnings and making advancement difficult.⁷⁹ Over forty percent of married women and married women with children in the home do not participate in the labor force and earn no income.⁸⁰ Wives who work outside the home receive on

design dispute resolution systems harbor a moral responsibility to promote the equality between men and women this society allegedly reveres. Without acknowledging the world in which most, if not all, women live and struggle, this responsibility goes unfulfilled.

Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 448-49 (1992).

77. See Abrams, *supra* note 74, at 337 (identifying a feminist critique of dominance feminism similar to the view and goals expressed in this text); see also Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25 (1990).

78. See DOWD, *supra* note 21, at 22; VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 62 (1988); OKIN, *supra* note 19, at 155-56.

79. See, e.g., DOWD, *supra* note 21, at 20-21; OKIN, *supra* note 19, at 144-46.

80. In 1987, 51% of married women did not participate in the paid labor force. See ARLENE F. SALUTER, U.S. BUREAU OF THE CENSUS, U.S.

average less than half the income of married men.⁸¹ Consistent with their caregiving responsibility, wives with births spaced over many years and wives with many children have the lowest wages of all wives.⁸² As a result, wives, especially those with children, usually are financially dependent upon husbands. Their financial dependency creates severe pressure to settle unwisely.

Characteristically the husband controls the marital financial resources,⁸³ restricting the wife's access to the funds she needs to survive. Moreover, many husbands refuse to pay temporary child support and/or spousal maintenance. The wife then cannot meet her and the children's basic needs. Utility companies threaten to discontinue services. Mortgage companies warn of foreclosure. The family can no longer afford enough healthy food.⁸⁴ Medical and dental care become luxuries.

If the wife can afford a lawyer or if she has sufficient sophistication to represent herself, she can request a temporary support order. Yet a hearing on a petition for temporary support may not occur for months⁸⁵ and many judges refuse to make such awards.⁸⁶ Even when judges do

DEPT OF COMMERCE, CURRENT POPULATIONS REPORTS SPECIAL STUDIES, SERIES P-23, No. 163, CHANGES IN AMERICAN FAMILY LIFE 18 (1989). A 1991 U.S. Bureau of the Census report indicates that 58% of married women participate in the paid labor force. See Amato, *supra* note 14, at 208 (citing U.S. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, 1991, Tbl. 131).

81. See SYLVIA ANN HEWLETT, *A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA* 82 (1986). Garrison found that in contested divorce cases husbands' incomes averaged approximately three times those of wives. See Garrison, *supra* note 14, at 652.

82. See HEWLETT, *supra* note 81, at 81-83.

83. The husband's authority or power over financial matters stems from his individual possession of resources, such as wages and prestige, that are given value in the world outside the family. See PHILIP BLUMSTEIN & PEPPER SCWARTZ, *AMERICAN COUPLES* 52-93 (1983); see also OKIN, *supra* note 19, at 156-59.

84. See, e.g., WEITZMAN, *supra* note 14, at 339-40. See generally *In re Marriage of Gurin*, 571 N.E.2d 857, 864 (Ill. App. Ct. 1991).

85. See Judge James Delaney, *How to Bring Legal Sanity to Domestic Relations: Civilizing Family Courts*, 2 FAM. ADVOC. 20, 23 (1980).

86. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 21; Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247, 250 n.11 (1993); *Florida Gender Bias Report*, *supra* note 43, at 187-88; *Missouri Gender Bias Report*, *supra* note 43, at 550-51.

order temporary support, many husbands fail to comply.⁸⁷ During divorce negotiations, the wife's desperate financial situation may encourage her to accept a poor settlement offer. On the streets, attorneys call this well-known tactic "starving her out."⁸⁸

The wife's relative lack of financial resources hampers her ability to pay attorney fees.⁸⁹ Many wives proceed without lawyers⁹⁰ or agree to joint representation by lawyers their husbands have chosen.⁹¹ Wives who seek

87. Karen Winner relates one woman's story:

After divorce proceedings began, a judge ordered Mr. Miller to continue supporting his wife and their three young sons. But Miller stopped sending checks after a few months. At the same time, Merrily was working for a weekly wage of \$75 as a part-time teaching assistant—clearly not enough to support herself or their young children. Merrily Miller had to find a law firm that would help her collect child support. [A]fter three years the law firm had not collected a single penny for her, and she and her three young sons fell into desperate poverty But the ruling by New York State Supreme Court Justice Vincent Gurahian only made matters worse. The judge forgave Merrily's husband the \$88,000 he owed to Merrily in child support and maintenance

KAREN WINNER, *DIVORCED FROM JUSTICE: THE ABUSE OF WOMEN AND CHILDREN BY DIVORCE LAWYERS AND JUDGES* 23-24 (1996); see also FLORENCE W. KASLOW & LITA LINZER SCHWARTZ, *THE DYNAMICS OF DIVORCE: A LIFE CYCLE PERSPECTIVE* 66 (1987).

88. See WEITZMAN, *supra* note 14, at 161-62; *Florida Gender Bias Report*, *supra* note 43, at 810; *Missouri Gender Bias Report*, *supra* note 43, at 535. As Winner notes:

In divorce court, some lawyers use so-called scorched earth tactics against wives in a campaign to wear them down and starve them out. They attempt to outspend the wife by legally obstructing the proceedings and delaying an agreement until she finally runs out of money and patience and gives up.

WINNER, *supra* note 87, at 58. Cases challenging settlement agreements frequently reflect the circumstances that Winner describes and that courts largely ignore. See generally Penelope E. Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L. Q. 177, 177-88 (1994).

89. See ARENDELL, *supra* note 14, at 12; *Florida Gender Bias Report*, *supra* note 43, at 808-11; *Missouri Gender Bias Report*, *supra* note 43, at 528-30.

90. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 20; WINNER, *supra* note 87, at xviii-xxxix; Czapanskiy, *supra* note 86, at 250 n.11; *In re Marriage of Broday*, 628 N.E.2d 790 (Ill. App. Ct. 1993).

91. See *In re Marriage of Brandt*, 489 N.E.2d 902 (Ill. App. Ct. 1986). Judges, however, typically hold wives without funds responsible for "choosing" to proceed *pro se* and refuse to vacate allegedly unfair

independent legal representation often cannot find it. Lawyers know that wives frequently cannot pay their fees and that courts commonly refuse to order husbands to pay those fees.⁹²

Even if both spouses can afford attorneys, frequently the wife is forced to hire a less expensive and less competent lawyer.⁹³ Wives who initially can afford to hire lawyers also may run out of money during the lengthy divorce process⁹⁴ and many courts refuse to award her attorney fees during the pendency of the divorce.⁹⁵ Limited financial resources leave wives vulnerable to numerous

agreements. See, e.g., *In re Broday*, 628 N.E.2d at 795-96. Courts also presume that wives receive adequate independent representation from attorneys their husbands have chosen represent them. See, e.g., *In re Brandt*, 489 N.E.2d 902.

92. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 21; Czapanskiy, *supra* note 86, at 250 n.11; *Florida Gender Bias Report*, *supra* note 43, at 808-11; Garrison, *supra* note 14, at 712; *Missouri Gender Bias Report*, *supra* note 43, at 531-34 (noting that many attorneys admitted their reluctance to represent women in divorce proceedings because they knew they would not get paid); Lynn Hecht Schafran, *Gender and Justice: Florida and the Nation*, 42 FLA. LAW REV. 181, 187-88 (1990).

93. See Bryan, *supra* note 88, at 177-88; *Florida Gender Bias Report*, *supra* note 43, at 810. Many lawyers, particularly good and expensive lawyers, admit that they prefer to represent husbands because husbands can pay their fees. Winner states:

The man who controls the family's money—and his wife's share—is in a position financially and legally to overpower his spouse in the divorce proceeding. In 1991 Barbara L. Paltrow, President of the Nassau County Women's Bar Association, described the prototypical case in a letter to her peers: 'He had access to high priced legal talent from the start, access to lawyers who knew how to use the system to great and often unfair advantage. The wife, on the other hand, quickly discovered that most lawyers would not represent her on the promise of getting paid, eventually, from family resources controlled by the husband. In order to have any representation these women had to exhaust their life savings, if they had any, and borrow to the hilt from family or friends. Even this was rarely enough to pay for the protracted litigation forced upon them.'

WINNER, *supra* note 87, at 13.

94. See *Florida Gender Bias Report*, *supra* note 43, at 808-09; *Missouri Gender Bias Report*, *supra* note 43, at 535.

95. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 21; Czapanskiy, *supra* note 86, at 250 n.11; *Florida Gender Bias Report*, *supra* note 43, at 808-09; *Missouri Gender Bias Report*, *supra* note 43, at 550-51.

adversarial tactics that prolong the divorce process and increase their expenses.⁹⁶ Husbands' attorneys may delay, file frivolous motions, and fail to comply with discovery requests.⁹⁷ Husbands themselves may foil discovery and conceal assets.⁹⁸ When women clients can no longer pay, lawyers sometimes abandon them or provide inadequate representation.⁹⁹

96. One seasoned family law attorney put it this way:

The inability of the economically dependent spouse to participate on equal footing in litigation in the areas of domestic relations . . . creates bias in my opinion in favor of men and against women and runs to all areas, all issues in domestic relations. The party with the control of the finances literally has such a significant advantage in my opinion that they cannot only control the litigation but also wind up with a great advantage on every issue and I think if played right can succeed in almost every issue. We see this more and more.

Missouri Gender Bias Report, supra note 43, at 530.

97. See WINNER, *supra* note 87, at 66-70. Winner tells of Charlotte Bogart, who in 1981 at the age of 58 separated from her husband Donald after a 26-year marriage. During the marriage, Donald had beaten Charlotte, breaking her leg and injuring her shoulder on separate occasions. Donald's lawyer requested bifurcation of the divorce from the maintenance and property issues. Charlotte had to change lawyers during the divorce. Her former lawyer wrote her new lawyer a letter warning of Donald's lawyer's threats to delay the ultimate settlement for years. The judge granted the divorce in 1988, retaining jurisdiction over the remaining property and support issues. Once the divorce was final, Donald, who had control over the \$1,000,000 marital estate, lost all motivation to settle the remaining issues. Thirteen years later, at the age of 71, Charlotte finally gave up her fight and accepted her ex-husband's settlement offer. She had paid over \$100,000 in attorney fees during her 13-year struggle for justice. See *id.* at 66-69. Many times divorce cases are settled before the parties exchange basic financial information. In their study of 349 Wisconsin divorce cases, Melli et al. found that only 90 case files contained mandatory Financial Disclosure Sheets from both parties. One hundred twenty-six case files contained little or no financial information. See Melli et al., *supra* note 15, at 1146-47.

98. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, 22-23; WEITZMAN, *supra* note 14, at 342-43 (noting that some men delay a bonus, commission, or raise until after the divorce, minimizing the income available for child support or spousal maintenance).

99. See WINNER, *supra* note 87, at xix, 13. Winner tells Ginger's story:

Barkley [Ginger's brother] related how his sister's first attorney had walked off the case. Her siblings had sunk more than \$30,000 into legal fees for the lawyer to defend their sister's rights in court, only to see him withdraw from the proceeding after his bill climbed to \$70,000. He had already threatened to

The wife's inadequate financial resources may prevent her and/or her attorney from conducting her case in a manner that effectively protects her interests.¹⁰⁰ Because husbands generally control the marital financial resources and sometimes conceal assets¹⁰¹ or deliberately misrepresent the value of these assets,¹⁰² the wife frequently must conduct expensive discovery. If she cannot afford discovery, she will lack the information she needs to negotiate effectively and to determine whether a settlement offer is fair.¹⁰³ Many wives simply cannot afford discovery.¹⁰⁴

quit unless he got more money, so one of Ginger's sisters, a retired school teacher, had borrowed \$23,000 on her credit cards to pay him to continue representing Ginger. They had also signed a promissory note. Despite these payments, the attorney dropped Ginger's case four months later. He had the judge's permission to do so.

WINNER, *supra* note 87, at 17; see also *Florida Gender Bias Report*, *supra* note 43, at 809. As an alternative to abandonment, a lawyer may insist that the client sign a confession of judgment or a promissory note that can later serve as the basis for the lawyer's lien on the client's property, sometimes the marital home. See WINNER, *supra* note 87, at 85-88.

100. See WISCONSIN EQUAL JUSTICE TASK: FINAL REPORT 237-38 (1991) [hereinafter WISCONSIN GENDER BIAS REPORT]; *Missouri Gender Bias Report*, *supra* note 43, at 528-30.

101. See PATRICIA PHILLIPS, *DIVORCE: A WOMAN'S GUIDE TO GETTING A FAIR SHARE* 94, 101-09 (1995); WINNER, *supra* note 87, at 64-65; see also *In re Marriage of Palacios*, 656 N.E.2d 107, *appeal denied*, 662 N.E.2d 427 (Ill. App. Ct. 1995) (finding that husband concealed \$5.38 million in lottery winnings from his wife); *In re Marriage of Frederick*, 578 N.E.2d 612 (Ill. App. Ct. 1991); *Ridgway v. Ridgway*, 497 N.E.2d 126 (Ill. App. Ct. 1986); *In re Marriage of Broday*, 628 N.E.2d 790 (Ill. App. Ct. 1993); *Bellow v. Bellow*, 352 N.E.2d 427 (Ill. App. Ct. 1976).

102. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 22-23. See generally *In re Marriage of Brandt*, 489 N.E.2d 902 (Ill. App. Ct. 1986).

103. See, e.g., MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 22-23; OKIN, *supra* note 19, at 152; *Florida Gender Bias Report*, *supra* note 43, at 810; Melli et al., *supra* note 15, at 1146-47; see also MacDougall, *supra* note 16, at 34 (discussing the importance of information to effective negotiation). Cases challenging settlement agreements abound with examples of wives and/or their attorneys failing to conduct discovery. Typically, courts either perceive the wife's or her attorney's failure to conduct discovery as the product of the wife's negligence. See, e.g., *In re Broday*, 628 N.E.2d at 795. They fail to acknowledge that the wife's meager financial resources may compromise her ability to discover. For instance, in *In re Marriage of Broday*, the court cites the wife's negligence to discover in denying her later claim of concealment or misrepresentation by her husband. See *id.*

If the wife's attorney attempts discovery, often the courts do not enforce the request.¹⁰⁵

Once the marital assets are identified, they must be valued. Appraisers or financial consultants must be retained. Their services add expenses the wife can ill-afford.¹⁰⁶ Moreover, courts rarely award adequate expert witness fees in divorce cases.¹⁰⁷ Even if the wife can afford to employ some experts, the husband often can hire more convincing experts with better credentials.

The wife's caretaking responsibilities within the family can create additional financial pressures. Despite the growing prevalence of egalitarian sex-role attitudes, wives still retain primary responsibility for homemaking and child rearing.¹⁰⁸ The wife's acceptance of this role is secured

104. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 22-23; *Missouri Gender Bias Report*, *supra* note 43, at 531.

105. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 22-23.

106. Winner writes:

Husbands usually control the money supply at the end of the marriage. If a woman's husband chooses to conceal assets, the discovery process can be dragged out for years, her lawyer charging fees every step of the way, in the effort to collect and assess financial information from her husband and his lawyers. . . . For many women, the process of discovery is much like cutting off an arm to save a finger. Commissioning experts to track down assets is a major expense. And the financial information the lawyer obtains from the husband and his attorneys doesn't necessarily help women in the courtroom, because the information often isn't reliable. Perjury is a major problem in divorce court.

WINNER, *supra* note 87, at 40-41; see also *Florida Gender Bias Report*, *supra* note 43, at 810.

107. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 21.

108. Statistics from 1995 indicate that women spend more than three times as many hours caring for children and substantially more time at household tasks than do men. See Laura Shapiro, *The Myth of Quality Time*, NEWSWEEK, May 12, 1997, at 62, 68. As noted by Fuchs:

In the early years of the sex-role revolution there was a hope that differences in homemaking and childcare responsibilities would disappear, but this is not occurring on a large scale. There are some households in which the father does as much as or more than the mother, but they are the exception, not the rule. Moreover, almost one child in four is raised in a household without a father or stepfather. Children are still predominately women's concern.

FUCHS, *supra* note 78, at 72. Fuchs concludes that women's disproportionate responsibility for child care provides the most powerful

through her socialization as a caregiver and through the validation that she receives from her husband and children, and from society for behaving in conformity with unspoken expectations of self-sacrifice.¹⁰⁹ The importance the wife places on her caregiving role encourages her to place greater value on having custody of the children than does her husband.¹¹⁰ A loss of custody would not only unacceptably alter her relationship with the children, it would deeply violate her sense of self.¹¹¹ A divorcing mother, then, may be inclined to accept an unfair financial agreement if her husband threatens a custody dispute.¹¹²

explanation of the difference in men and women's earnings. *See id.* at 60-62. Although the gap between men and women's wages closed by an unprecedented seven percent between 1980 and 1986, Fuchs explains that the improvement was due largely to the increased percentage of women workers who were born after 1946 and had fewer children. *See id.* at 65-66; *see also* MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 161-65 (1995); WINNER, *supra* note 87, at 47.

109. *See generally* CHESLER, *supra* note 45.

110. In her study of the California divorce courts, Weitzman found that 96% of the divorced women, compared to 57% of divorced men, reported that they wanted custody of their children. Only 38% of the divorced men, however, spoke of custody with their lawyers and only 13% requested custody in their divorce petition. Weitzman concludes that most divorcing fathers are not seriously interested in having custody of their children, while most divorcing mothers are. *See* WEITZMAN, *supra* note 14, at 243-44. Others found a similar discrepancy between what type of custody fathers said they wanted and what custody they actually requested. In seeking to explain this discrepancy, the researchers speculated that fathers may not have wanted custody as passionately as mothers, that fathers may have conformed to the social expectation that women "should" have custody, that fathers may have perceived their wishes as unrealistic because they were less experienced parents than their wives, or that fathers ultimately may have perceived their desire for custody as inconsistent with the demands of their work. *See* Mnookin et al., *supra* note 42, at 72.

111. *See* CHESLER, *supra* note 45, at 334-38; *Missouri Gender Bias Report*, *supra* note 43, at 536; Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 96-98 (1993). Moreover, divorced mothers without custody face social stigmatization. Since most people believe that the law favors mother custody and that all good mothers want custody, what kind of mother could she possibly be if she lost or voluntarily relinquished custody? *See* CHESLER, *supra* note 45, at 176-82.

112. *See* MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 25 (noting that in divorce mediation women bargain away their economic rights in order to retain custody of the children); *see also* WINNER, *supra*

The wife's meager financial resources make her fear of losing custody even more salient, for she knows that she cannot, and that he can, hire attorneys and experts.¹¹³

B. *Psychological Factors and Socialized Tendencies*

Many psychological factors or socialized tendencies cause wives significant problems in divorce negotiations.¹¹⁴ Particularly important are intangible resource disparities between men and women, more particularly, disparities between husbands and wives. Lawyers negotiate many divorce settlements for their clients, arguably insulating women from the consequences of the following characteristics. However, as explained earlier, many wives lack the financial resources necessary to hire lawyers.¹¹⁵

note 87, at 50-51; *Florida Gender Bias Report*, *supra* note 43, at 819-20; Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168 (1984).

113. Experienced lawyers recognize that the wife's limited financial resources compromise her interests on all divorce issues. See *Missouri Gender Bias Report*, *supra* note 43, at 530. Winner tells Cyndi's particularly disturbing story:

Cyndi, a working mother from New York said the court papers were filled with falsehoods about her ability as a mother, which Cyndi had to defend herself against. She knew that in reality her husband did not want custody, because he had expressed little desire to care for the children. The father's real goal was to get out of paying child support. If he obtained custody, Cyndi, as the noncustodial parent, would be legally responsible for paying child support. Cyndi's husband and his lawyer convinced the judge through false statements that she was not as good a mother as he was a father. The judge believed him and Cyndi lost custody. But not too long afterward, and unknown to the court, her ex-husband sent the kids to live with her. Cyndi is still paying her husband child support, even though she is now the de facto custodial parent. She told me she would rather keep her kids, even if it means paying child support too, because they mean more to her than anything. She fears having to go back to court to reopen the custody dispute, but adds that the current situation is also hard for her. If she does something to displease her ex-husband she knows that he can wrench the children away at any time, as their lawful custodial parent.

WINNER, *supra* note 87, at 63-64. In its most extreme form, the wife's training/socialization as caregiver has led some women to relinquish custody in order to protect their children from a custody battle.

114. See Bryan, *supra* note 76, at 457-81.

115. See *supra* notes 79-113 and accompanying text.

These wives must negotiate directly with their husbands. Moreover, as discussed later, many lawyers represent wives poorly, allow or encourage their clients to negotiate directly with their husbands, and/or serve merely as clerks who shepherd through the courts an agreement reached privately by the husband and wife.¹¹⁶ Consequently, even when lawyers represent wives, the following characteristics frequently have a direct effect on negotiated outcomes. When a wife's lawyer does negotiate competently on her behalf, the wife's characteristics can make it difficult for the lawyer to secure the wife's permission to act as an advocate. Finally, today many divorce agreements are reached in mediation where the wife and husband negotiate directly with one another.¹¹⁷ In mediation, these characteristics bear immediately upon the negotiated outcome.¹¹⁸

1. *Naïve trust.* Many wives naively trust their husbands,¹¹⁹ their lawyers, and the legal system during the divorce process.¹²⁰ The wife's naïve trust of her husband may encourage her to assume that she does not need her own lawyer to protect her interests and that her husband will treat her fairly at divorce.¹²¹ Some wives agree to representation by attorneys that their husbands or their husband's lawyers have chosen.¹²² Others perceive discovery

116. See *infra* pp. 181-86 and accompanying notes.

117. See Bryan, *supra* note 76, at 447.

118. Mediators claim they can balance the power between husbands and wives during mediation and thus, prevent lop-sided agreements. Upon closer examination, however, this claim proves false. See Bryan, *supra* note 76, for an explanation of why mediators do not and cannot compensate for the power imbalances between husbands and wives. Moreover, even when lawyers represent wives in mediation, power imbalances between spouses can still severely disadvantage wives. See Bryan, *supra* note 88, at 193. The Massachusetts' Gender Bias Report reveals that mediation disadvantages women on financial as well as child issues. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 23-27.

119. The wife's financial dependency upon her husband helps explain her naïve trust of him. Because of the dependent person's psychological need to perceive her benefactor as benevolent, dependency tends to breed naïve trust.

120. See ARENDELL, *supra* note 14, at 9.

121. See *In re Marriage of Broday*, 628 N.E.2d 790, 795 (Ill. App. Ct. 1993).

122. See *In re Marriage of Beck*, 404 N.E.2d 790, 795 (Ill. App. Ct.

as unnecessary because they trust their husbands to define accurately, to value fairly, and even to divide appropriately, the marital assets.¹²³ Marital scripts exacerbate the tendency of wives to defer to husbands on financial issues.

While many couples today exhibit egalitarian attitudes about marriage, the traditional division of labor within the family seems quite intractable.¹²⁴ Certainly more wives than ever now participate in the workforce and share the burden of providing for the family.¹²⁵ Yet husbands exercise greater control over marital decisionmaking than wives, particularly on important financial decisions.¹²⁶ When a husband has exercised authority over financial issues, the wife may accept his definition and valuation of the marital property rather than require verification by an expert, particularly if she lacks the resources to hire that expert.¹²⁷

The wife's naive trust in the justice of the legal system¹²⁸ and in the integrity of her lawyer discourages her

1980); *Beattie v. Beattie*, 368 N.E.2d 178, 179-80 (Ill. App. Ct. 1977).

123. See *infra* pp. 191-203 and accompanying text.

124. See DOWD, *supra* note 21, at 33; FINEMAN, *supra* note 108, at 164; Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1415-16, 1435, 1451-53 & n.125 (1991); see also *supra* notes 108-09 and accompanying text. Pateman traces the historical evolution of women's domestic service within the family and concludes that being a woman (wife) means providing services for and at the command of a man (husband). See PATEMAN, *supra* note 2, at 116-28.

125. See Czapanskiy, *supra* note 124, at 1415 & n.1, 1451-53 & n.124.

126. See, e.g., BLUMSTEIN & SCHWARTZ, *supra* note 83, at 53-59, 62-65.

127. See, e.g., *In re Broday*, 628 N.E.2d 790, 795 (Ill. App. Ct. 1993).

128. Sarat and Felstiner note that divorce clients "come to the divorce lawyer's office believing in the efficacy of rights in the legal system, only to encounter a process that not only is 'inconsistent,' but cannot be counted on to protect fundamental rights or deal in a principled way with the important matters that come before it." AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 93 (1995). These authors relate an exchange between a female divorce client, Jane, and her attorney, Peter:

Jane: I just really cannot quite believe this. Part of me is still incredulous. It's nothing else than property rights. I don't even have the rights of a landlord, to go to a home that I own 50 percent of, to make sure it's not being destroyed. I don't understand that. I always thought that, in some way or another, if one's human rights were not protected, one's property rights were.

from exercising the vigilance needed to protect her interests.¹²⁹ Moreover, when a wife finally realizes that her husband is indifferent to her needs, that the judge truly is biased, or that her lawyer has unjustly or incompetently compromised her case, she becomes frightened and disheartened. The brutality of the transition from the mindset of the family to that of law and the market can stun and confuse her,¹³⁰ leaving her ill-equipped to fend for herself during divorce negotiations.¹³¹

2. *Care orientation.* Much has been written about women's ethic of care, their distinctive orientation towards moral issues.¹³² The literature suggests that women tend to

Peter: No.

Id.

129. As Winner notes:

Women . . . are more likely [than men] to regard the system idealistically, believing perhaps too literally in the image of the blindfolded lady holding up the scales of justice. It is little wonder that so many women made poorer by their divorces use the same words to describe this misplaced trust in the system, saying, 'I was so naive—I was a babe in the woods'.

WINNER, *supra* note 87, at 12.

130. Regan explains the dichotomy between the family and the market as follows:

In this dichotomy, the family represents the sphere of life characterized by relationships of mutuality and care, in which individuals are willing to forego their own advantage for the sake of others with whom they share largely ineluctable bonds. The interdependence of family members' lives creates the prospect that individuals within a family may sometimes be subject to obligations that cannot wholly be described as voluntarily chosen. By contrast, the market ostensibly is the realm of the sovereign individual, animated by self-interest, who surrenders her freedom only to the degree that she has consented to do so. Individuals in the market thus relate as strangers, whose ties to one another are deliberately forged as well as broken, and whose obligations to each other are best characterized as contractual.

Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2306 (1994).

131. See KIRP ET AL., *supra* note 5, at 179 (noting the difference between family and marketplace norms). Cases offer numerous examples of the wife's failure to comprehend the law and the significance of legal proceedings. Moreover, some wives seem so stunned by their attorneys' claims that the offers before them are the best the law provides that they acquiesce without question or contest. See, e.g., *In re Marriage of Brandt*, 489 N.E.2d 902 (Ill. App. Ct. 1986).

132. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL

care more for others than for themselves,¹³³ whereas men exhibit more individualistic tendencies.¹³⁴ In the family, where women are socially conditioned to perform as caretakers,¹³⁵ this tendency becomes more pronounced.¹³⁶

Although caring for others and tending to relationships has great value, this orientation may create problems for wives during divorce negotiations. The preference for private ordering in divorce cases assumes that two self-interested individuals conduct negotiations.¹³⁷ Moreover, as noted earlier, wives may be particularly vulnerable to their husbands' threats to seek custody of the children.¹³⁸ Their care orientation enhances that vulnerability. Wives' care orientation also encourages them to focus on the emotional issues in divorce, sometimes to the exclusion of financial

THEORY AND WOMEN'S DEVELOPMENT (1982) (spawning debate about the existence and the origin of women's care orientation).

133. Gilligan explains:

In analyzing women's thinking about what constitutes care and what connection means, I noted women's difficulty in including themselves among the people for whom they considered it moral to care. The inclusion of self is genuinely problematic not only for women but also for society in general. Self-inclusion on the part of women challenges the conventional understanding of feminine goodness by severing the link between care and self-sacrifice; in addition, the inclusion of women challenges the interpretive categories of the Western tradition, calling into question descriptions of human nature and holding up to scrutiny the meaning of "relationship," "love," "morality," and "self."

Carol Gilligan, *Prologue: Adolescent Development Reconsidered*, in MAPPING THE MORAL DOMAIN VII, XXX-XXXI (Carol Gilligan et al. eds., 1988); see also GILLIGAN, *supra* note 132; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1601 (1991). The tendency of wives to discount the importance of their own needs may be particularly acute in violent marriages. See ANGELA BROWNE, WHEN BATTERED WOMEN KILL 78-79 (1987); Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2162 (1993).

134. See GILLIGAN, *supra* note 132.

135. See, e.g., Herma Hill Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in DIVORCE REFORM AT THE CROSSROADS 6, 30 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

136. Williams argues that the market requires the husband to perform as an ideal worker with few family responsibilities. In order for husbands to meet this market requirement, wives assume the domestic responsibilities. See Williams, *supra* note 26, at 2235-41.

137. See Mnookin, *supra* note 1, at 367-68.

138. See *supra* notes 110-13 and accompanying text.

issues.¹³⁹ Husbands, on the other hand, tend to treat the divorce more as a business transaction.¹⁴⁰

3. *Status.* Income, education, occupational rank, and sex determine an individual's status.¹⁴¹ Status significantly influences negotiation dynamics because people grant authority to high status persons,¹⁴² as well as defer to the opinions of, and succumb, knowingly or unconsciously, to the influence of high status persons.¹⁴³ During divorce negotiations, husbands tend to have higher status than their wives,¹⁴⁴ encouraging others, including attorneys and wives, to defer to them. Moreover, women's lower status relative to men makes women more easy to influence than men and promotes their greater tendency to conform¹⁴⁵—troublesome traits in negotiations.

139. See Bryan, *supra* note 76, at 488-90 & n.203.

140. See WINNER, *supra* note 87, at 23, 57. Winner explains:

"Being nice" to her husband during the divorce was the main concern of Rae Logan, Director of the State Bond Commission in Louisiana. Logan concedes: "I was so concerned about being nice. He got the Fiat, the savings account, and the girlfriend. I got the bills, the furniture, and the children. It was my fault. I was so concerned with maintaining his image. I was concerned with not being seen as the stereotypical 'hysterical' divorcee." Many women, to their own disadvantage, are simply not culturally geared to think about money at the time of divorce.

Id. at 12; see also Isolina Ricci, *Mediator's Notebook: Reflections on Promoting Equal Empowerment and Entitlements for Women*, J. DIVORCE, Spring-Summer 1985, at 49.

141. See Bryan, *supra* note 76, at 458-63.

142. See Alice H. Eagly, *Gender and Social Influence: A Social Psychological Analysis*, 38 AM. PSYCHOL. 971 (1983); see also JOHN SCANZONI, *SEXUAL BARGAINING: POWER POLITICS IN THE AMERICAN MARRIAGE* 82-83 (2d ed. 1982).

143. See generally Joseph Berger & Morris Zelditch, Jr., *Artifacts and Challenges: A Comment on Lee and Ofshe*, 46 SOC. PSYCHOL. Q. 59 (1983); Eagly, *supra* note 142; Gerald W. McDonald, *Family Power: The Assessment of a Decade of Theory and Research, 1970-1979*, 42 J. MARRIAGE & FAM. 841 (1980); Charlan Jeanne Nemeth, *Reflections on the Dialogue Between Status and Style: Influence Processes of Social Control and Social Change*, 46 SOC. PSYCHOL. Q. 70 (1983); Aysan Tuzlak & James C. Moore, Jr., *Status, Demeanor and Influence: An Empirical Reassessment*, 47 SOC. PSYCHOL. Q. 178 (1984).

144. See Bryan, *supra* note 76, at 458-63, for an explanation of status disparities between men and women, particularly between husbands and wives.

145. See *id.* at 462.

4. *Self-Esteem*. People with high self-esteem negotiate better outcomes than do people with low self-esteem.¹⁴⁶ High self-esteem also leaves one less vulnerable to the influence of others.¹⁴⁷ In contrast, low self-esteem can inhibit bargaining ability and encourage people to accept unfavorable settlements.¹⁴⁸

For a variety of reasons women have low self-esteem,¹⁴⁹ and women have lower self-esteem than do men.¹⁵⁰ Divorce exacerbates the disparity in self-esteem between men and women because the loss of marital status depresses the wife's self-esteem more than it does the husband's.¹⁵¹ Divorcing wives with low self-esteem may be vulnerable to

146. See John F. Stolte, *Self-Efficacy: Sources and Consequences in Negotiation Networks*, 119 J. SOC. PSYCHOL. 69 (1983); see also JOHN SCANZONI & MAXIMILIANE SZINOVACZ, *FAMILY DECISION-MAKING: A DEVELOPMENTAL SEX ROLE MODEL* 31 (1980).

147. See, e.g., Steven J. Sherman, *Internal-External Control and Its Relationships to Attitude Change Under Different Social Influence Techniques*, 26 J. PERSONALITY & SOC. PSYCHOL. 23 (1972); David Vern Stimpson, *The Influence of Commitment and Self-Esteem on Susceptibility to Persuasion*, 80 J. SOC. PSYCHOL. 189 (1970).

148. "[D]iminished feelings of self-worth may inhibit the ability to bargain constructively and effectively, or worse, produce an abject acceptance of almost any terms dictated by the other." KENNETH KRESSEL, *THE PROCESS OF DIVORCE: HOW PROFESSIONALS AND COUPLES NEGOTIATE SETTLEMENTS* 83 (1985). Kressel speaks of the low self-esteem of the spouse whose husband or wife seeks the divorce. See *id.* No reason exists, however, to suspect that low self-esteem attributable to this cause has greater effect on negotiating ability than low self-esteem attributable to other causes.

149. See Bryan, *supra* note 76, at 472-74 for an explanation of women's low self-esteem.

150. See, e.g., Jon W. Hoelter, *Factorial Invariance and Self-Esteem: Reassessing Race and Sex Differences*, 61 SOC. FORCES 834 (1983); Sharron Koffman & Hilary M. Lips, *Sex Differences in Self-Esteem and Performance Expectancies in Married Couples*, 8 SOC. BEHAV. & PERSONALITY 57 (1980). But see Marlene Mackie, *The Domestication of Self: Gender Comparisons of Self-Imagery and Self-Esteem*, 46 SOC. PSYCHOL. Q. 343 (1983) (finding no self-esteem differences between husbands and wives).

151. See, e.g., William A. Barry, *Marriage Research and Conflict: An Integrative Review*, 73 PSYCHOL. BULL. 41 (1970); Anne Statham Macke et al., *Housewives' Self-Esteem and their Husbands' Success: The Myth of Vicarious Involvement*, 41 J. MARRIAGE & FAM. 51 (1979) (finding that housewives' self-esteem is related to perceived marital success); Marlene Mackie, *supra* note 141, at 346. As one author notes "becoming a man's wife is still the major means through which most women can find a recognized social identity." See PATEMAN, *supra* note 2, at 132. Loss of that valued identity can lead to lowered self-esteem.

their husbands' or their attorneys' attempts to influence them, and may be more inclined than their husbands to accept poor offers.¹⁵²

5. *Depression.* Generally women suffer far more from depression than do men.¹⁵³ Married couples exhibit an even greater difference in depression between men and women.¹⁵⁴ At divorce, the wife's acquisition of unfamiliar roles (primary bread-winner/single parent), her loss of the valued role of wife, and her predictable financial problems enhance the likelihood of her depression.¹⁵⁵ Depression has a devastating impact on a person's ability to negotiate effectively,¹⁵⁶ and truly depressed persons predictably fare poorly in negotiations¹⁵⁷.

6. *Expectations.* People who negotiate with higher expectations tend to obtain more than people with lower expectations.¹⁵⁸ Women expect less than men for their contributions.¹⁵⁹ Consequently, in divorce negotiations many wives expect and obtain a smaller share of the marital

152. See Bryan, *supra* note 76, at 472 & n.125.

153. Rosenfield notes that the differences between depression in men and women are "found across cultures, over time, in different age groups, in rural as well as urban areas, and in treated as well as untreated populations. Researchers estimate that women have as much as twice the rate of distress and depression as men." Sarah Rosenfield, *The Effects of Women's Employment: Personal Control and Sex Differences in Mental Health*, 30 J. HEALTH & SOC. BEHAV. 77, 77 (1989). For an explanation of why women are more prone to depression than men, see Bryan, *supra* note 76, at 467-68.

154. See Rosenfield, *supra* note 153, at 77.

155. See Bryan, *supra* note 76, at 469-70.

156. See *id.* at 466-71.

157. See *id.*; see also Bryan, *supra* note 88, at 177-88, 199-200 (providing an example of how depression affects negotiation competence).

158. See DONALD G. GIFFORD, *LEGAL NEGOTIATIONS: THEORY AND APPLICATIONS* 99 (1989) (citations omitted); DEAN G. PRUITT, *NEGOTIATION BEHAVIOR* 26 (1981) (citing John G. Holmes et al., *The Effects of Prenegotiation Expectations on the Distributive Bargaining Process*, 7 J. EXPERIMENTAL SOC. PSYCHOL. 582-99 (1971)); Donald L. Harnett et al., *Personality, Bargaining Style and Payoff in Bilateral Monopoly Bargaining Among European Managers*, 36 SOCIOMETRY 325, 342 (1973).

159. See Bryan, *supra* note 76, at 475-77 for an explanation of why women expect less than men.

assets than do their husbands.¹⁶⁰

7. *Conflict Resolution Styles*. Bargaining over scarce marital resources is inherently competitive¹⁶¹ and normally induces competitive negotiation tactics.¹⁶² A party reluctant to assertively counter such tactics is disadvantaged. Several factors discourage women from using assertive conflict resolution styles in divorce negotiations.¹⁶³

In the early 1970's, Matina Horner found that women were inhibited in achievement-oriented behavior.¹⁶⁴ Women saw their feminine sex role identity as inconsistent with displays of competence, independence, competition, intellectual acumen, and leadership.¹⁶⁵ They also feared that engaging in such displays risked social rejection, loss of femininity, and personal or social destruction.¹⁶⁶ Many had high ability and cared about achievement.¹⁶⁷ Nevertheless, even when they knew their success necessitated competitive behavior, they hesitated to behave in a competitive fashion.¹⁶⁸ Their greatest hesitation occurred when they

160. See *infra* pp. 191-210 and accompanying notes for an example.

161. Conflict theorists acknowledge the competitive nature of bargaining over scarce resources. See, e.g., KENNETH E. BOULDING, *CONFLICT AND DEFENSE: A GENERAL THEORY* 4-5 (1962); MORTON DEUTSCH, *THE RESOLUTION OF CONFLICT* 20-25 (1973).

162. See Morton Deutsch, *Conflict and Its Resolution*, 7 Nat'l Tech. Info. Service Technical Rep. No. 1, (Oct. 1, 1965); Barbara J. Lonsdorf, *Coercion: A Factor Affecting Women's Inferior Financial Outcome in Divorce*, 3 AM. J. FAM. L. 281, 288 (1989). See, e.g., June Starr & Barbara Yngvesson, *Scarcity and Disputing: Zeroing-In on Compromise Decisions*, 2 AM. ETHNOLOGIST 553 (1975).

163. See WINNER, *supra* note 87, at 12, 23, 57 (1996); Bryan, *supra* note 76, at 477-81; see also Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421 (1992) (finding that women's greater "taste for cooperation" than men's disadvantages women in negotiations). Moreover, Rose persuasively argues that the simple perception of others that women have a greater "taste for cooperation" than men can disadvantage women in negotiations. *Id.*

164. See Matina S. Horner, *Toward an Understanding of Achievement-Related Conflicts in Women*, 28 J. SOC. ISSUES 157, 173 (1972).

165. See *id.* at 171.

166. See *id.* at 162.

167. See Bryan, *supra* note 76, at 427 & n.125.

168. See Horner, *supra* note 164, at 171. The negative consequences anticipated by these women seem quite reasonable when one considers that women's popularity is adversely affected by aggressive, assertive

competed with men¹⁶⁹ or when important males, particularly husbands or intimates, or parents disapproved of their achievement-oriented behavior.¹⁷⁰

Although Horner conducted this research nearly thirty years ago and women's worlds undoubtedly have changed since then, more recent research suggests the continuing viability of Horner's findings. Susan Pollack and Carol Gilligan found that a greater percentage of women than men associate violence with competitive success.¹⁷¹ Other research confirms that men, as well as women, feel threatened when women dominate in an achievement situation.¹⁷² Taken together these findings suggest that women tend to avoid competition and to perform beneath their abilities in competitive situations, particularly when they compete with males to whom they closely relate.

behavior. See Edward K. Sadalla et al., *Dominance and Heterosexual Attraction*, 52 J. PERSONALITY & SOC. PSYCHOL. 730, 731-34 (1987). Additionally, women's recent advances have precipitated a powerful backlash. See generally SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (1991).

169. See Horner, *supra* note 164, at 173.

170. See *id.* at 168-69. Horner's original research has received criticism on methodological grounds and has proven difficult to replicate. See, e.g., Adeline Levine & Janice Crumrine, *Women and the Fear of Success: A Problem in Replication*, 80 AM. J. SOC. 964, 969-71 (1975) (finding no sex differences in fear of success imagery); Belle Rose Ragins & Eric Sundstrom, *Gender and Power in Organizations: A Longitudinal Perspective*, 105 PSYCHOL. BULL. 51, 71 (1989). More recent research, however, lends support to Horner's original conclusions. See *infra* pp. 136-37 and notes 171-73.

171. See Susan Pollak & Carol Gilligan, *Images of Violence in Thematic Apperception Test Stories*, 42 J. PERSONALITY & SOC. PSYCHOL. 159, 163 (1982). This research, like Horner's, has been criticized. See Cynthia J. Benton et al., *Is Hostility Linked with Affiliation Among Males and With Achievement Among Females? A Critique of Pollak and Gilligan*, 45 J. PERSONALITY & SOC. PSYCHOL. 1167 (1983). See generally Bernard Weiner et al., *Compounding the Errors: A Reply to Pollak and Gilligan*, 45 J. PERSONALITY & SOC. PSYCHOL. 1176 (1983) (criticizing Pollak and Gilligan's study). A more recent study that replicates Pollak and Gilligan's findings, however, suggests that the unwelcome message brought by Pollak and Gilligan's work, rather than faulty methodology, explains the controversy. See Vicki S. Helgeson & Don J. Sharpsteen, *Perceptions of Danger in Achievement and Affiliation Situations: An Extension of the Pollak and Gilligan Versus Benton et al. Debate*, 53 J. PERSONALITY & SOC. PSYCHOL. 727 (1987) (citing Susan Pollak & Carol Gilligan, *Killing the Messenger*, 48 J. PERSONALITY & SOC. PSYCHOL. 374 (1985)).

172. See Helgeson & Sharpsteen, *supra* note 171, at 732.

Research indicates that women, in fact, tend to employ weak, indirect tactics, whereas men tend to use strong, direct tactics.¹⁷³

Women are also more reluctant than men to behave competitively in situations in which competition meets with disapproval.¹⁷⁴ A wife's assertive demands in divorce negotiations often meet with her husband's, and sometimes with her attorney's, disapproval. She often then abandons those demands.¹⁷⁵

When couples resolve marital conflicts, wives tend to accommodate, compromise, and facilitate more than their husbands.¹⁷⁶ Moreover, a study of distressed married couples suggests that wives have more difficulty asserting themselves in conversations with their husbands than they do in conversations with other men.¹⁷⁷ Spouses inevitably bring their marital conflict resolution styles to the divorce negotiation table,¹⁷⁸ compromising the wife's ability to protect her interests.¹⁷⁹

173. See generally Gloria Cowan et al., *The Effects of Target, Age and Gender on Use of Power Strategies*, 47 J. PERSONALITY & SOC. PSYCHOL. 1391 (1984); Toni Falbo & Letitia Anne Peplau, *Power Strategies in Intimate Relationships*, 38 J. PERSONALITY & SOC. PSYCHOL. 618 (1980); Judith A. Howard et al., *Sex, Power and Influence Tactics in Intimate Relationships*, 51 J. PERSONALITY & SOC. PSYCHOL. 102 (1986).

174. See Sheryle Whitcher Alagna, *Sex Role Identity, Peer Evaluation of Competition, and the Responses of Women and Men in a Competitive Situation*, 43 J. PERSONALITY & SOC. PSYCHOL. 546, 553 (1982); see also KRESSEL, *supra* note 148, at 52-53; Ricci, *supra* note 140, at 53.

175. As Isolina Ricci notes:

When [the wife] does develop a utilitarian parenting or financial plan, the husband might call her "cold," "calculating" or "selfish." Without interventions, these attributional labels may be taken to heart rather than identified as a part of the husband's bargaining tactics, and the wife may pull back and revise her plan to gain his approval.

Ricci, *supra* note 140, at 53.

176. See Leonard H. Chusmir & Joan Mills, *Gender Differences in Conflict Resolution Styles of Managers: At Work and At Home*, 20 SEX ROLES 149, 151 (1989).

177. See Anne K. McCarrick et al., *Gender Differences in Competition and Dominance During Married Couples Group Therapy*, 44 SOC. PSYCHOL. Q. 164 (1981).

178. See Bryan, *supra* note 76, at 453 n.37.

179. During the investigation of gender bias in the Massachusetts courts, Barbara Hauser, a director of the Family Service Clinic at Middlesex Probate Court, testified:

At times it appears that the court and its personnel have a

The foregoing illustrates the practical, psychological, and social factors that inhibit a wife's ability to negotiate a fair divorce settlement. Formal divorce laws exacerbate her problems.

II. INDETERMINATE MASCULINE LAW

The law fails to compensate adequately for the wife's disadvantage in divorce negotiations. Quite the reverse. As the wife exits the marriage in which her caregiving and sacrifices were endorsed and encouraged, she finds her life recast in a masculine ideology of law and the market—an ideology that comprehends the world through lenses of autonomy, self-interest, formal equality, and individualism.¹⁸⁰ The sacrifices that she made in the marketplace in order to fulfill her caregiving obligations,¹⁸¹ her continued financial dependency, her socialized tendencies, and her prior investment in the family are acknowledged only grudgingly in a world framed by these

limited appreciation about the inequality in ability of parties to bargain effectively at the time of marital separation. Women in these times often feel less adequate than men in areas of articulating their needs and wishes, forcefulness in negotiating, and economic stability. Furthermore, women often have a wish to resolve conflict through communication and mediation rather than taking a more adversarial posture, and it is thus important that these differences be recognized rather than overlooked in any form of divorce proceedings.

MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 25.

180. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713-16 (1976) (discussing the ideology of individualism); see also Martha A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2182 (1995) (finding that society mythologizes autonomy and independence). Feminists have claimed that legal concepts based upon the experiences and interests of certain groups of men fail to reflect or consider the life experiences of women and other nondominant groups. See, e.g., Martha Chamallas, *Self-Defense and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill: Hostile Domestic Environments: Commentary on Jane Maslow Cohen's Regimes of Private Tyranny*, 57 U. PITT. L. REV. 809 (1996); Frances Olsen, *The Sex of Law*, in *THE POLITICS OF LAW* 453 (David Kairys ed., 1990). Pateman also argues that the concept of individualism itself contemplates men, not women. See PATEMAN, *supra* note 2, at 184-85.

181. See KIRP ET AL., *supra* note 5, at 18.

concepts.¹⁸² A closer examination of the substantive law and its application clarify these points.

A. *The Custody Standard*

Society encourages married women to define themselves primarily as mothers and wives, and they do.¹⁸³ Moreover, mothers provide far more child caretaking than fathers.¹⁸⁴ For most divorcing mothers, then, a loss of custody becomes an unacceptable loss of self.

The best interests of the child standard governs custody decisions.¹⁸⁵ A typical statute lists ten or twelve factors relevant to determining what custody and/or visitation arrangement best serves a child's interest.¹⁸⁶ At first blush,

182. Martha Fineman argues that egalitarian ideology has helped to neuter motherhood by devaluing and making invisible the caretaking function that mothers typically perform. See FINEMAN, *supra* note 108, at 68; see also Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 60-65, 71-73 (1989) (arguing that a homemaker spouse's decision to decrease her earning capacity to accommodate her spouse's lifestyle preferences should not be compensated with alimony when that decision yields a reduction in aggregate marital income except when her services include primary responsibility for child care); Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C.L. REV. 721, 721-22, 728-30 (1993).

183. See PATEMAN, *supra* note 2, at 141.

184. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 61; Florida Gender Bias Report, *supra* note 43, at 821.

185. See, e.g., David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 477, 568 (1984); Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 432 (1990); Czapanskiy, *supra* note 124, at 1442; Susan Beth Jacobs, *The Hidden Gender Bias Behind "The Best Interest of the Child" Standard in Custody Decisions*, 13 GA. ST. U. L. REV. 845, 849 & nn.32-34 (1997).

186. Michigan's custody statute, for example, states:

As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court: (a) The love, affection, and other emotional ties existing between the parties involved and the child. (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any. (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other

this may seem a friendly standard for a parent who has invested substantial time in childcare. During the past decade, however, fathers' groups have adeptly employed the rhetoric of formal equality to press for legislation expressing preferences for joint custody,¹⁸⁷ a presumption that divorced children benefit from substantial and continuing contact with both parents,¹⁸⁸ and friendly parent provisions¹⁸⁹ that favor the parent most likely to promote

remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs. (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity. (e) The permanence, as a family unit, of the existing or proposed custodial home or homes. (f) The moral fitness of the parties involved. (g) The mental and physical health of the parties involved. (h) The home, school, and community record of the child. (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference. (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents. (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child. (l) Any other factor considered by the court to be relevant to a particular child custody dispute.

MICH. COMP. LAWS ANN. § 722.23 (West 1993).

187. See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 758-59 (1988); Joanne Schulman & Valerie Pitt, *Second Thoughts on Joint Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U. L. REV. 538 (1982) (discussing joint custody).

188. See Czapanskiy, *supra* note 124, at 1442. The political and social importance of the struggle for control over children extends beyond any single mother/father dispute over custody. To the extent that custodial parents have a better opportunity than non-custodial parents to implant values in the hearts and minds of their children, the ten million single-mothers raising children pose a distinct threat to the hegemony of patriarchy. See Fineman, *supra* note 180, at 2211 n.74 (citing that ten million women are single mothers living with children under 21 years old). One can understand then their attempts to reinsert fathers into the families of custodial mothers. See Bryan, *supra* note 76, at 495-96, n.237; see also DOWD, *supra* note 21; Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19 (1995). Additionally, conservatives attempt to reinsert fathers into the families of custodial mothers. See FINEMAN, *supra* note 108, at 118-19; Fineman, *supra* note 180, at 2206-07.

189. The friendly parent provisions can create other perverse situations. One gender bias study revealed that the wife, advised by counsel to be "friendly" to the children's father, allowed her husband

the non-custodial parent's relationship with the children. These changes place fathers on equal legal footing with the primary caretaker¹⁹⁰ mother.¹⁹¹ A mother who has invested

frequent contact with the children. At the final divorce hearing the court granted the husband primary residential custody of the children, reasoning that the mother did not really want the children because she allowed the father to see them so often. *See Florida Gender Bias Report, supra* note 43, at 819-23; Schulman & Pitt, *supra* note 187, at 554-56, 572-77 (discussing friendly parent provisions).

190. In *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981), Justice Neely of the West Virginia Supreme Court recognized that the best interests standard's indeterminacy provoked custody litigation, hindered settlement, and provided no guidance to courts. *See id.* at 361-63. He also noted that the insecurity the standard created in caretaking mothers allowed fathers to leverage better financial results by threatening to contest custody. *See id.* at 360-62. To minimize this dysfunctionality, Justice Neely turned to the primary caretaker standard. He defined the primary caretaker as one who:

has taken primary responsibility for, *inter alia*, the performance of the following caring and nurturing duties of a parent: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e., transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e., babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e., teaching general manners and toilet training; (9) educating, i.e., religious, cultural, social, etc.; and, (10) teaching elementary skills, i.e., reading, writing and arithmetic.

Id. at 363. Many feminists have endorsed the primary caretaker standard because of its gender neutrality and the value it imparts to caregiving. *See, e.g.,* Mary E. Becker, *Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for Acts of Others*, 2 U. CHI. L. SCH. ROUNDTABLE 13, 28-29 (1995); Fineman, *supra* note 187, at 768-74; Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 237, 241-43 (1982). Their voices, however, have fallen on the deaf ears of male legislators and judges who undoubtedly recognize that the primary caretaker standard likely would deprive fathers of the leverage they currently enjoy under the best interests standard, preferences for joint custody, and friendly parent provisions.

191. *See* Fineman, *supra* note 187, at 739; Polikoff, *supra* note 190, at 240. Fineman argues that the egalitarian ideology that has helped to neuter motherhood also stigmatizes untraditional forms of motherhood. She explains:

[A]n important component of the neutering process has been the designation of untraditional forms of motherhood as

substantially more of herself in the children than the father may fear that her commitment will go unrecognized and unrewarded when a court applies these standards.¹⁹² Many fathers threaten a custody dispute using the mother's fear to gain settlement advantages.¹⁹³ His threat combined with her fear weakens considerably her negotiation position on child-related and financial issues.

The indeterminacy of the best interests standard, coupled with the gender bias of judges¹⁹⁴ and mental health professionals,¹⁹⁵ exacerbate her concern. A mother might ignore her husband's custody threats if she could rely upon unbiased custody decisionmakers.

As many writers have observed, however, the indeterminacy of the best interests standard creates wide discretion for trial court judges¹⁹⁶ and permits judges to discriminate against women in custody decisions.¹⁹⁷ For

'pathological' or deviant. This stigmatizing process makes mothering outside of the context of a two-parent, traditional family susceptible to extensive legal regulation and supervision. Mother and child alone are incomplete and insufficient—the cause and perpetrators of social decay and decline.

FINEMAN, *supra* note 108, at 68.

192. See WINNER, *supra* note 87, at 48-49; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 43-44 (1991).

193. See *Florida Gender Bias Report*, *supra* note 43, at 819-20.

194. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 62-73; Jacobs, *supra* note 185; Polikoff, *supra* note 190, at 237-41.

195. See *infra* notes 211 & 212 and accompanying text.

196. See David N. Bolocofsky, *Use and Abuse of Mental Health Experts in Child Custody Determinations*, 7 BEHAV. SCI. & L. 197, 203 (1989) (explaining that in a survey of lawyers, judges, and mental health professionals, over 70% thought the best interests of the child standard was unclear); Chambers, *supra* note 185; see also Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1533 (1994); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 955 (1979); Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975). See generally MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY, THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991) (advocating the abandonment of abstract equality standards in custody decisions in favor of valuing the nurturing of children).

197. See CHESLER, *supra* note 45, at 210-34; MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 62-66, 69-73; GENDER BIAS TASK FORCE REPORT OF SOUTH DAKOTA 4 (1994) (finding that those surveyed perceived gender bias against women as most prevalent in

instance, many complain that courts typically devalue the nurturing that mothers provide,¹⁹⁸ and favor the superior economic resources of the father.¹⁹⁹ On the other hand, if a mother and a father both work, courts view her employment as in conflict with the children's best interests.²⁰⁰ Courts find mothers with ambitious careers even more suspect.²⁰¹ In contrast, judges believe the father's employment benefits the children.²⁰² Courts hold mothers to higher standards of parenting than fathers.²⁰³ If a mother temporarily relinquishes custody to the father for any reason, courts find her an improper custodian.²⁰⁴ Uninvolved or long-absent fathers, on the other hand, are encouraged to reestablish their relationships with their children.²⁰⁵ Additionally, the illicit sexual relations of mothers compromise their custody claims far more severely than do the illicit sexual relations of fathers.²⁰⁶ When

four areas: rape, custody, sentencing, and child support); WINNER, *supra* note 87, at 46-49; *Florida Gender Bias Report*, *supra* note 43, at 819-23; Christopher P. Gilkerson, *Theoretics of Practice: The Integration of Progressive Thought and Action: Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 880-81 (1992); Linda R. Keenan, Note, *Domestic Violence and Custody Litigation: The Need for Statutory Reform*, 13 HOFSTRA L. REV. 407, 412 (1985).

198. See Polikoff, *supra* note 190, at 237-38.

199. See CHESLER, *supra* note 45, at 83-84; WINNER, *supra* note 87, at 47-48; Gilkerson, *supra* note 197, at 880-81; Jacobs, *supra* note 185, at 858-63, 880-83; Polikoff, *supra* note 190, at 237-39.

200. See DOWD, *supra* note 21, at 6-8; MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 63; WINNER, *supra* note 87, at 46-47; Jacobs, *supra* note 185, at 863-68; Polikoff, *supra* note 190, at 237-39. Our society expects mothers to devote themselves to rearing children. Because an employed mother does not devote her entire self to rearing the children, her motherhood is suspect. On the other hand, our society does not expect fathers to devote themselves to rearing children. His employment, then, does not make his fatherhood suspect. See Gilkerson, *supra* note 197, at 880-81. See generally CHESLER, *supra* note 45, at 49-63. Prejudice against working mothers persists despite studies indicating that children benefit from their mother's work and greater economic independence. See DOWD, *supra* note 21, at 33.

201. See Jacobs, *supra* note 185, at 868-71.

202. See Polikoff, *supra* note 190, at 237-39.

203. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 63-64; *Florida Gender Bias Report*, *supra* note 43, at 822; Jacobs, *supra* note 194, at 857; Schafran, *supra* note 92, at 192.

204. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 64.

205. See *id.* at 64-65.

206. See *id.* at 65; Jacobs, *supra* note 194, at 872-74, 892-93;

mothers allege that a father has physically or sexually abused a child, judges frequently disbelieve them²⁰⁷ and use friendly parent provisions to deprive them of custody.²⁰⁸ In

Schafran, *supra* note 92, at 192.

207. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 69-70; Becker, *supra* note 190, at 24-25. See generally Sharon R. Lowenstein, *Child Sexual Abuse in Custody and Visitation Litigation: Representation for the Benefit of Victims*, 60 UMKC L. REV. 227 (1991). Contrary to judicial beliefs, research reveals that allegations of child sexual abuse arise infrequently in custody disputes and that allegations in the divorce context prove unfounded no more frequently than in other contexts. See Becker, *supra* note 190, at 25; Jessica Pearson, *Ten Myths About Family Law*, 27 FAM. L.Q. 279, 293-95 (1993). Pearson notes that, "while these allegations may be increasing, they are hardly rampant." Pearson, *supra*, at 294. More specifically, Pearson found that sexual abuse allegations surfaced in only two percent of the 9000 divorce proceedings that occurred during a six-month period. See *id.* at 294; see also Meredith Sherman Fahn, *Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter*, 25 FAM. L.Q. 193, 194, 202 (1991) (rejecting the idea that allegations of child sexual abuse made during custody disputes automatically deserve suspicion). Pearson's results hardly seem surprising in light of other studies. For instance, Bross notes that "[t]he frequency of child sexual abuse is disconcerting. . . . In a 1985 poll, researchers interviewed 2626 [sic] adults from the fifty states. Among this representative sample of Americans eighteen years old or over, twenty-two percent of the women and fifteen percent of the men reported being sexually abused as children." Donald C. Bross, *Terminating the Parent-Child Legal Relationship as a Response to Child Sexual Abuse*, 26 LOY. U. CHI. L.J. 287, 289 (1995) (citing Lois Timinick, *The Times Poll: 22% in Survey Were Child Abuse Victims*, L.A. TIMES, Aug. 25, 1985, at A1).

208. See Becker, *supra* note 190, at 26-27. In a Maryland case the judge denied the mother custody of two pre-teen daughters because he felt that the father's sexual abuse of the girls was not as damaging as the mother's decision to report him. According to the judge, her reporting "showed [that] her hatred for the father took precedence over the children's need to hold a high image of their father." Czapanskiy, *supra* note 86, at 256 (citing GENDER BIAS IN THE COURTS: REPORT OF THE MARYLAND SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS 30 (1989)). Czapanskiy describes another case in which the mother accused the father of sexual abuse of their daughter. The trial court found that the mother was overreacting, that the father posed no danger to the child, and that overnight visitation was appropriate provided one of four persons close to the father was present. In entering this order, the trial court ignored evidence that the father admitted to sexually abusing the wife's older daughter by a previous marriage, overwhelming evidence that the father inflicted excessive punishment on the older daughter, that he denied he needed treatment for this conduct, and that the father had physically and sexually abused the mother. See *id.* at 268-69 (discussing *Hanke v. Hanke*, 615 A.2d 1205 (Md. App. 1992)). About the time that the trial court entered its order

such a gender hostile context, no mother can reasonably anticipate fair judicial treatment. The father's threat, or anticipated threat, of a custody dispute remains salient throughout negotiations.²⁰⁹

In contested custody cases, courts usually seek guidance from mental health professionals.²¹⁰ These professionals, however, have a long history of discrimination against women generally,²¹¹ and against mothers in particular.²¹² Some of them also perform

for unsupervised visitation, the mother moved with the child to Kentucky. No visitation with the father took place. However, the trial court transferred custody from the mother to the father, likely to punish the mother for moving and for noncompliance with the visitation order. *See id.* at 268 n.65. Fortunately, the appellate court found the trial court had erred. *See id.*; see also Anna Quindlen, *Legal System Turning a Blind Eye to Sexual Abuse of Our Children*, CHI. TRIB., Dec. 12, 1994, § 1, at 15 (discussing similar cases throughout the United States).

209. *See* Jacobs, *supra* note 194, at 882; Neely, *supra* note 112 at 168.

210. *See* PETER G. JAFFE ET AL., CHILDREN OF BATTERED WOMEN 108 (1990); Fineman, *supra* note 187, at 740-44, 764-65; MYRA SUN & ELIZABETH THOMAS, CUSTODY LITIGATION ON BEHALF OF BATTERED WOMEN (1987) (finding that in custody disputes judges followed the recommendations of mental health professionals 90% of the time).

211. *See* HEWLETT, *supra* note 82, at 246-47; CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 152-53, 283 n.42 (1989). In the past, the male dominated psychological profession has marginalized women's concerns, portrayed women as inferior hysterical human beings, and urged women to happily assume their proper subordinate position to men. Sanity in women often meant little more than proper accommodation to male dominance. *See generally* PHYLLIS CHESLER, WOMEN AND MADNESS (1972).

212. Mental health professionals have blamed mothers for children's developmental problems. *See* Becker, *supra* note 190, at 13; Fineman, *supra* note 187, at 767 n.161; Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1682 (1990); Roberts, *supra* note 111, at 110-11 & n.81. Moreover, currently the mental health professions have deftly seized significant control in child custody decisionmaking. *See* Fineman, *supra* note 187. In addition, men have organized politically and have successfully pushed for joint custody. *See* Dan Menzie, Note, *Fathers are Parents Too: Pros and Cons of the New Missouri Domestic Relations Statute*, 57 UMKC L. REV. 963 (1989). As men become organized, the ability of the mental health profession to retain its decisional control on child issues depends upon placation of these elite males who now actively seek increased parental rights. The psychological profession's current bias in favor of joint custody suggests its continued accommodation to pre-existing hierarchy rather than its concern for children's best interests. *See generally* Fineman, *supra* note 187.

incompetently.²¹³ Moreover mental health professionals strongly favor shared parenting²¹⁴ and the participation of both parents in the post-divorce lives of their children.²¹⁵ This bias presumes that men and women make equal parental contributions, exaggerates the importance of fathers, and undervalues the mother's primary caretaking role.²¹⁶ Their involvement in custody decisionmaking frequently compromises, rather than respects, a mother's interest in custody.

Courts also employ guardians ad litem to assist in custody decisionmaking.²¹⁷ Many of these guardians perform incompetently.²¹⁸ Moreover, no reason exists to assume that

213. Courts typically defer to court ordered custody evaluations despite their inadequacies. Daniel Shuman notes that throughout the judicial system judges are holding expert witnesses more accountable—except in the areas of child custody and visitation. See Daniel W. Shuman, *What Should We Permit Mental Health Professionals to Say About "The Best Interests of the Child"?: An Essay on Common Sense, Daubert, and the Rules of Evidence*, 31 FAM. L.Q. 551 (1997). For instance, courts accept syndrome testimony despite the lack of scientific support for the existence of the syndrome. See *id.* at 564-65. Moreover, Marc and Melissa Ackerman's survey of psychologists who perform custody evaluations revealed that one-third of these experts used two tests, the MCMI-II and the MCMI-III, on divorcing parents, ignoring that the tests were designed for a clinical rather than a normal population. See Marc J. Ackerman & Melissa C. Ackerman, *Child Custody Evaluation Practices: A 1996 Survey of Psychologists*, 30 FAM. L.Q. 565, 573 (1996). Interestingly, one survey indicated that family law attorneys thought mental health experts were of little help in child custody decisions. They presented expert testimony largely to discredit their opponent's expert. See Robert D. Felner et al., *Child Custody Resolution: A Study of Social Science Involvement and Impact*, 18 PROF. PSYCHOL.: RES. & PRAC. 468 (1987).

214. See Fineman, *supra* note 187, at 734-35.

215. See *id.* at 750-51 & nn.102-04.

216. See *id.* at 734-35.

217. See Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785, 1785 (1996).

218. See Robert F. Kelly & Sarah H. Ramsey, *Monitoring Attorney Performance and Evaluating Program Outcomes: A Case Study of Attorneys for Abused and Neglected Children*, 40 RUTGERS L. REV. 1217, 1238-40 (1988) (finding that attorneys routinely represent children incompetently); Robert E. Shepherd, Jr. & Sharon S. England, *"I Know the Child is My Client, But Who Am I?"*, 64 FORDHAM L. REV. 1917, 1924-32, 1933-43 (1996) (explaining that many children do not receive competent legal advocacy and that confusion over the proper role of those appointed to represent children compounds incompetence); see also Emily Buss, *"You're My What?" The Problem of Children's*

court appointed guardians ad litem are less prone to gender bias against women and mothers than are other professionals. Mothers cannot rely upon competent unbiased decisionmakers in a custody dispute.

Moreover, the wide open best interests standard provides an advantage for the wealthier spouse, usually the husband,²¹⁹ who can hire a better lawyer and employ experts with better credentials who are more persuasive.²²⁰ Fathers' relative economic advantage also allows them to survive protracted litigation without hardship, in contrast to the financial desperation experienced by mothers and their children.²²¹ Unsurprisingly, many studies now confirm that when a father contests custody, he more likely than not will win.²²²

Misperceptions of Their Lawyers' Roles, 64 FORDHAM L. REV. 1699, 1699-1706 (1996); Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655 (1996) (discussing empowerment as the key element in defining a lawyer's relationships to a child client); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399, 1399 (1996); Peter Margulies, *The Lawyer as Caregiver: Child Client's Competence in Context*, 64 FORDHAM L. REV. 1473 (1996); Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505 (1996); Stuckey, *supra* note 217, at 1785-93.

219. See *supra* notes 79-113 and accompanying text.

220. See WINNER, *supra* note 87, at 61; see also Garska v. McCoy, 278 S.E.2d 357, 362 (W. Va. 1981); Becker, *supra* note 190, at 28; Mildred Daley Pagelow, *Justice for Victims of Spouse Abuse in Divorce and Child Custody Cases*, 8 VIOLENCE AND VICTIMS 69, 78 (1993).

221. See *supra* notes 79-113 and accompanying text.

222. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 59, 62-63 (noting that Massachusetts fathers who seek custody obtain either primary or joint physical custody more than 70% of the time); WISCONSIN GENDER BIAS REPORT, *supra* note 100, at 197 (noting that judges reported they "about equally" awarded custody to men and women in contested custody cases); *Florida Gender Bias Report*, *supra* note 43, at 821-22 & n.101; Polikoff, *supra* note 190, at 236-37; see also CHESLER, *supra* note 45, at 78-80 tbl.4 (finding that in 70% of disputed custody cases fathers won custody); *id.* at 65-66 (noting that many studies, including her own, indicate that fathers who contest custody are more likely than their wives to win); WEITZMAN, *supra* note 14, at 233-34 tbl.22; Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107, 120 & n.37; Lenore J. Weitzman & Ruth B. Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12

A deserving mother's realistic fear of losing custody then, might induce her to agree to a custody or visitation arrangement that compromises both her and the children's interests.²²³ Moreover, her fear of provoking a custody contest may hinder her ability to demand fairness in financial negotiations,²²⁴ particularly if she lacks the economic resources to hire an attorney or to build a good custody case.²²⁵ Perversely, the worse the father's parenting during the marriage, the more the mother may desire custody in order to protect the children, and the more vulnerable she may become to financial manipulation.

B. *Spousal Maintenance Law*

On their face, maintenance statutes show sensitivity to the financial dependency and care-giving contributions of long-term homemakers and custodial mothers of young children.²²⁶ In their application, however, maintenance statutes fail to fulfill their facial promise.²²⁷

Whereas approximately sixty percent of divorcing couples have children, and mothers receive custody

U.C. DAVIS L. REV. 471, 502-04 (1979) (finding that in 63% of disputed custody cases in Los Angeles in 1977 fathers won custody). *But see* Mnookin et al., *supra* note 42, at 53 (finding that when mothers' and fathers' requests for custody conflicted, mothers' requests were granted approximately twice as often as fathers' requests). Yet, when both parents requested sole custody, mothers received what they requested in only 46.2% of the cases. *See id.* at 54 tbl.2.6.

223. *See* WEITZMAN, *supra* note 14, at 393-94.

224. Commentators and researchers report that women frequently compromise financial requests in order to retain custody of the children. *See, e.g.,* Becker, *supra* note 190, at 28-29; Fineman, *supra* note 187, at 761; *Florida Gender Bias Report*, *supra* note 43, at 819-20; Heather Ruth Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L.Q. 79, 101 (1986) (finding that a significant number of interviewed women admitted bargaining away property or support rights in return for child custody).

225. *See* WINNER, *supra* note 87, at 50-51; *Florida Gender Bias Report*, *supra* note 43, at 819; Neely, *supra* note 112.

226. *See* WEITZMAN, *supra* note 14, at 149; Estin, *supra* note 182, at 727-29 (noting that maintenance statutes in more than 20 states acknowledge that a parent's custodial obligations may influence his or her need for maintenance).

227. *See* WISCONSIN GENDER BIAS REPORT, *supra* note 100, at 229-39; Estin, *supra* note 182, at 728-30 & n.20.

approximately ninety percent of the time,²²⁸ only ten to seventeen percent of divorcing wives receive any spousal maintenance.²²⁹ Moreover, less than half of the wives married for more than fifteen years receive any maintenance²³⁰ and custodial mothers with dependent

228. In a study of 908 divorcing families in California, only 20% of the divorce petitions indicated a conflict between the mother's and the father's custody request. See Mnookin et al., *supra* note 42, at 51. In the 693 uncontested cases, the mother received sole custody 90% of the time. See *id.* at 52. In the contested cases, mothers' requests were granted twice as often as fathers' requests. More specifically, in the 190 contested cases, mothers received what they asked for in 115 cases, fathers received what they requested in 50 cases, and a compromise was reached in 25 cases. See *id.* at 53. Many other sources confirm that mothers receive custody more often than fathers. See, e.g., MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 61 (noting that Massachusetts mothers have primary physical custody in the great majority of cases). However, when mothers and fathers dispute custody, findings from other studies differ significantly from Mnookin's. For instance, in Massachusetts, when fathers and mothers dispute custody, the father receives either primary or joint physical custody more than 70% of the time. See *id.* at 59.

229. See, e.g., MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 30 (noting that nationwide only 12.4% of people divorced between 1980 and 1985 obtained an alimony award) (citing U.S. BUREAU OF THE CENSUS, U.S. Dep't of Commerce (1989)); WEITZMAN, *supra* note 14, at 167, 362 (noting that in 1977 only 17% of wives in two California counties received maintenance); Terry J. Arendell, *Women and the Economics of Divorce in the Contemporary United States*, 13 SIGNS 121, 133 (1987); U.S. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, SERIES P-23, No. 167, CHILD SUPPORT AND ALIMONY: 1987 (1990) (showing that in a 1988 Census survey, 17% of the divorced women reported that their divorce decree entitled them to spousal maintenance); Garrison, *supra* note 14, at 697 (finding that wives in three different New York counties received maintenance in only 4%, 15%, and 18% of divorce cases respectively); Garrison, *supra* note 14, at 634 n.44 (citing studies in which 30%, 18%, 10.9%, and 7% of wives were awarded alimony at divorce); Claire L'Heureux-Dube, *Economic Consequences of Divorce: A View From Canada*, 31 Hous. L. Rev. 451, 485 (1994) (showing that in Canada during 1990 only 16% of women requested spousal maintenance upon divorce and only 19% of custodial mothers requested spousal maintenance); Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, in DIVORCE REFORM AT THE CROSSROADS 191, 202 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (noting that approximately one-sixth of divorced women receive alimony and that two-thirds of the awards are for a short duration). Moreover, Weitzman found that more than one-half of the older housewives in her study received no maintenance. See WEITZMAN, *supra* note 14, at 183.

230. See WEITZMAN, *supra* note 14, at 187; Garrison, *supra* note 14,

children receive maintenance only twenty-five percent of the time.²³¹ Even when wives do obtain maintenance, the awards are small²³² and for a short duration.²³³

at 669-700 (explaining that only 34% of wives married for 20 or more years received spousal maintenance and more than one-half of them were awarded maintenance for a limited time); Garrison, *supra* note 14, at 669-03 (1991) (finding that in 1984 unemployed wives married for 20 or more years received permanent maintenance in only 32% of contested divorce cases). Weitzman also found that older long-term homemakers are expected to live on much smaller incomes than their ex-husbands. In 1977, in California, wives married 18 years or more with predivorce family incomes of \$20,000 to \$30,000 per year had, on the average, a median income of \$6,300 per year after the divorce, versus their husbands median income of \$20,000 per year after divorce. See WEITZMAN, *supra* note 14, at 190. Moreover, these women are more likely to have dependent children with whom they must share their income. See *id.* at 191. An estimate from The Displaced Homemakers Network suggests that 57% of displaced homemakers earn income at or near the poverty line. See Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 79 & n.50 (1993) (citing NATIONAL DISPLACED HOMEMAKERS NETWORK, THE MORE THINGS CHANGE . . . A STATUS REPORT ON DISPLACED HOMEMAKERS AND SINGLE PARENTS IN THE 1980S 20-21 (1990)).

231. See, e.g., ELEANOR E. MACCOBY & ROBERT MNOOKIN, DIVIDING THE CHILD 123-24 (1992) (finding that alimony was awarded in 30% of cases in which the divorcing couple had at least one child under the age of 16); MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 30 (finding that in Massachusetts families with minor children, wives receive alimony in only 10% to 20% of the cases). But see WEITZMAN, *supra* note 14, at 185 (demonstrating that in two California counties in 1977 only 22% of mothers with custody of minor children received maintenance and only 13% of mothers with pre-school children received maintenance); Garrison, *supra* note 14, at 704-06 (stating that in New York in 1984 only 25% of divorced mothers with custody were awarded spousal maintenance). The Massachusetts Gender Bias Task Force discovered that implementation of child support guidelines negatively affected the frequency of maintenance awards. Evidently, judicial officers conflate child and family support and believe maintenance unnecessary. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 30.

232. See WEITZMAN, *supra* note 14, at 171 (revealing that in 1977 the median maintenance award was \$210 per month); see also U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-23, No. 152, CURRENT POPULATION REP. (1989) (finding that the mean alimony award received by women was \$3,730 per year); Garrison, *supra* note 14, at 711-12 & n.270 (noting that census data and other time-series studies uniformly report declining alimony awards).

233. See Schafran, *supra* note 92, at 188. Weitzman's study revealed that in 1977 one-third of the alimony awards were open-ended or permanent, while two-thirds were for a limited duration. The median

Sometimes the husband does not make enough money to pay maintenance, especially if he also is ordered to pay child support.²³⁴ Studies, however, suggest that in many cases the inadequacy of maintenance awards is not related to the payor spouse's inability to pay.²³⁵ In her 1978 research on California divorce cases, Weitzman found that an ex-husband's standard of living generally increased about forty-two percent after divorce, while the ex-wife's standard of living generally declined about seventy-three percent.²³⁶ These results and many others like them²³⁷ are

duration of a transitional award was 25 months. *See* WEITZMAN, *supra* note 14, at 164-65; *see also* Garrison, *supra* note 14, at 634 n.45, 697-98 (citing numerous studies, including her own, that indicate a dramatic decline in permanent alimony awards). Weitzman comments that these meager awards thrust wives into the job market without affording them the time and financial resources to gain the education, career counseling, and training that they need to improve their job prospects. *See* WEITZMAN, *supra* note 14, at 167. Not only do just a few wives receive meager and short-term maintenance awards, but approximately one-half of those awards are never fully paid. *See* Rhode & Minow, *supra* note 229, at 202. These statistics stand in stark contrast to survey results indicating that 81% of women assume they will be able to obtain spousal maintenance if they need it. *See* Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 L. & HUM. BEHAV. 439, 443 (1993).

234. Weitzman found that husbands earning less than \$20,000 per year are rarely ordered to pay maintenance. *See* WEITZMAN, *supra* note 14, at 179. The Massachusetts Gender Bias Task Force found that judges assume, without factual verification, that husbands paying child support cannot afford maintenance. Massachusetts attorneys maintain, however, that courts cannot assess accurately what a husband can afford without proper discovery and factual findings. *See* MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 30.

235. *See* Garrison, *supra* note 14, at 707-09 (finding that the husband's income did not correlate with maintenance awards to low-earning wives or wives married for 20 years or more).

236. *See* WEITZMAN, *supra* note 14, at 338-39 fig.3. Weitzman elaborates:

Where the discrepancy [in the standard of living] is smallest—namely, in lower-income families—the husband and every member of his postdivorce family each have about twice as much money as his former wife and every member of her postdivorce family (i.e., typically, his children). Where the discrepancy is the greatest—in higher-income families—it is enormous: among families with predivorce incomes of \$40,000 or more a year, the wife is expected to live at 42 percent of her former per capita standard of living, while her husband is allowed 142 percent of his former per capita level. . . . In

difficult to square with the belief that most ex-husbands cannot afford spousal maintenance.²³⁸

addition, each person in the husband's new household—a new wife, or cohabitor, or possibly a child—has three times as much disposable income as those living with his former wife. Inasmuch as the other members of his former wife's household are almost always his own children, the discrepancy between the two standards of living is especially striking.

Id. at 191. Some argue that Weitzman's research suffers from "skewed statistical analyses" and researcher bias. Jed H. Abraham, "The Divorce Revolution" Revisited: A Counter-Revolutionary Critique, 9 N. ILL. U. L. REV. 251, 296 (1989). See generally Williams, *supra* note 26, at 2227 n.1 (citing commentators who criticize and defend Weitzman's findings). However, even those who criticize Weitzman's work generally agree that women's economic position after divorce is substantially worse than that of men. See, e.g., Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in DIVORCE REFORM AT THE CROSSROADS 130, 149-52 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

237. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 28; Garrison, *supra* note 14, at 633 n.42 (citing numerous studies indicating that women's standard of living dropped precipitously at divorce, while men's standard of living increased); Garrison, *supra* note 14, at 720-21 tbl.55 (The average post-divorce per capita income of wives and children was approximately 68% of their pre-divorce per capita income, whereas the per capita income of husbands increased by 182% after divorce.); McLindon, *supra* note 14, at 386-88 tbl.26 (noting that in New Haven, Connecticut, the per capita income of divorced women in the early 1980s was 69% of pre-divorce per capita median income, while the average per capita income of divorced men was 190% of pre-divorce per capita median income); Williams, *supra* note 26, at 2227 n.1; Wishik, *supra* note 224, at 97-98 tbl.5 (finding that the per capita income of women in Vermont dropped 33% after divorce, whereas the per capita income of Vermont men increased 120% after divorce). In Garrison's 1984 study of three New York counties, she found that in contested divorce cases, the wives who were married for 20 or more years and received permanent maintenance had an average income of \$5,757 after divorce, whereas their husbands' average post-divorce income was \$52,679. Wives in this group who received durationally-limited maintenance had an average income of \$7,458 after divorce, whereas their husbands' average post-divorce income was \$77,358. See Garrison, *supra* note 14, at 708 n.261.

238. In her 1977 study, Weitzman found that 83% of divorced men in California earned less than \$20,000 per year, and only 15% of these men were ordered to pay alimony. In contrast, 62% of divorced men earning above \$30,000 were ordered to pay alimony. Judges did not order men making less than \$20,000 to pay alimony, Weitzman believes, because judges did not think it was possible for these men to pay it. See WEITZMAN, *supra* note 14, at 181-82. Twila Perry argues that current efforts to develop a new theory of alimony do not address the interests of poor women because alimony generally is not available to them. See Twila Perry, *Alimony: Race, Privilege and Dependency in*

What explains the difficulty wives have in negotiating for maintenance? The rhetoric of formal equality that pervades divorce law weakens a wife's claim for maintenance. Formal equality is a double-edged sword for women who are not yet equal.²³⁹ Thinking of women as no different from men suggests that they are able to care for themselves just as men do;²⁴⁰ specifically, they can compete successfully in the job market.²⁴¹ This concept of equality

the Search for Theory, 82 GEO. L.J. 2481, 2484 (1994).

239. Most frequently, Herma Hill Kay is cited for expressing the concern that alimony might encourage women to remain dependent upon men. See Williams, *supra* note 26, at 2285 (referring to Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 80 (1987)). As Williams acknowledges, more recently Kay has moved away from this argument. See *id.* at 2285 (referring to Herma Hill Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in *DIVORCE REFORM AT THE CROSSROADS* 6, 32-34 (Stephen D. Sugarman & Herma Hill Kay eds., 1990)). Others, however, now reflect Kay's concern. See *id.* at 2285 n.299 (citations omitted). See generally FINEMAN, *supra* note 196 (noting throughout that the use of "rule" or formal equality rhetoric in divorce reform has compromised the position of many women on economic and custody issues). Fineman argues:

It has proven difficult for feminist legal theorists to offer remedies for unequal circumstances within an equality paradigm that emphasizes sameness of treatment and is suspicious of accommodating differences. Our institutions, particularly the family, are gendered. And, women are disadvantaged not only by the fact of gender differences but also by rules that ignore the different cultural and social mandates and restrictions built on gender differences.

FINEMAN, *supra* note 108, at 12; see also ARENDELL, *supra* note 14, at 152-54; Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987).

240. The public's attitude towards spousal maintenance seems to reflect some of this thinking. In her 1978 survey, Weitzman found that the public favored spousal maintenance in only four instances: (1) as support for the older homemaker; (2) as support until the ex-spouse became self-sufficient; (3) as support for mothers of young children; and (4) as a share of partnership assets the recipient spouse helped acquire. By the 1980s, most of the American public indicated that they favored spousal maintenance awards only for a short duration and only on the basis of need. See WEITZMAN, *supra* note 14, at 150-52. Estin argues that the self-reliance norm has overtaken concern for caregiving in maintenance awards. Estin, *supra* note 182, at 721-22, 728-30.

241. See *Florida Gender Bias Report*, *supra* note 43, at 814-16. Williams explains that the current ideal in family law is the self-reliance of all adults. See Williams, *supra* note 26, at 2232. Estin argues that many courts refuse to award caregivers maintenance in order to encourage self-reliance. See Estin, *supra* note 182, at 722-23, 725-26,

ignores that women generally receive less pay than men for the same or equally valuable work,²⁴² that women have more difficulty than men in securing suitable employment,²⁴³ that spousal maintenance may be necessary for women to begin to achieve actual equality with men,²⁴⁴

728-38.

242. See ARENDELL, *supra* note 14, at 60; KIRP ET AL., *supra* note 5, at 171; Arendell, *supra* note 229, at 129-30.

243. See ARENDELL, *supra* note 14, at 53-61. Qualified women also have more difficulty than qualified men in achieving deserved promotion. See WEITZMAN, *supra* note 14, at 350. Securing employment of any kind is particularly difficult for the divorced older long-term homemaker. See *id.* at 209-12.

244. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 31 (noting that education and training for future employment may necessitate maintenance). Some feminists resist the idea of spousal maintenance, arguing that these awards perpetuate women's dependence upon men and help sustain patriarchy. See generally FINEMAN, *supra* note 196, at 21-22 (noting that in the face of growing opposition, many feminist legal scholars continue to argue that true equality for women requires legal rules that ignore gender as a distinguishing characteristic); KIRP ET AL., *supra* note 5, at 178-82; WEITZMAN, *supra* note 14, at 359. But see BETTY FRIEDAN, *IT CHANGED MY LIFE* 325-26 (1976) (defending women's need of and right to spousal maintenance). Feminists who oppose maintenance overlook the reality of most women. Some dependence upon an ex-spouse seems better than poverty or severe economic deprivation. Support may be essential to the woman's physical and psychological health. Research indicates that age, education, and financial resources assist divorced parties in recovering from the stress of divorce. See Celvia Stovall Dixon & Kathryn D. Rettig, *An Examination of Income Adequacy for Single Women Two Years After Divorce*, 22 J. DIVORCE & REMARRIAGE 55, 60 (1994) (citations omitted); see also ARENDELL, *supra* note 14, at 68-70 (noting that work generally provides divorced mothers with income, increased self-esteem, contact with other adults, and personal growth). In one study, educational attainment and income accounted for 66% of the well-being of single-parent mothers. See Mary E. Duffy, *Mental Well-Being and Primary Prevention practices in Women Heads of One-Parent Families*, 13 J. DIVORCE 45 (1989). Moreover women can use spousal maintenance to achieve greater financial independence by seeking education, job training, or business opportunities. Divorced women instead often remain trapped in menial jobs and/or poverty. See ARENDELL, *supra* note 14, at 53-61; WEITZMAN, *supra* note 14, at 208-09. Finally, the desperate financial positions of divorced women frequently lead them to remarry, sometimes very unwisely. See CHAPTER 5, *supra* note 66, at 392-93. Because of inadequate post-divorce support, these women become "more" rather than "less" dependent upon men. While spousal maintenance perpetuates some dependence, it can also facilitate women's financial independence and alleviate post-divorce poverty. In arguing that women's caregiving

that society continues to demand that women fulfill the bulk of our collective responsibility for caregiving,²⁴⁵ and that the responsibilities of motherhood constrain women's marketplace participation,²⁴⁶ especially after divorce.²⁴⁷

responsibilities and their limited workforce opportunities help justify spousal maintenance for wives who are mothers, I adopt what Martha Fineman terms "acceptance" feminism. Fineman explains,

[A]cceptance arguments... encompass both biological and cultural sexual differences and seek to ensure 'symmetry' in the ultimate positions of women and men by taking account of those differences. In this way, acceptance arguments are similar to the earlier attempts to fashion different types of equality to gain equality of results.

FINEMAN, *supra* note 108, at 42 (citations omitted); *see also* Littleton, *supra* note 239. Certainly in the rare cases in which the father is the caregiving parent with compromised workforce participation, he should be eligible for spousal maintenance.

245. *See* ZILLAH R. EISENSTEIN, *FEMINISM AND SEXUAL EQUALITY* 146 (1984); FINEMAN, *supra* note 108, at 162-63; OKIN, *supra* note 19, at 5; Fineman, *supra* note 180, at 2199-2200. For instance, a 1988 study indicated that employed women spent twice as much time as their husbands on household tasks and child care, and that fathers in 1988 participated in child care only slightly more than they did in 1967. *See* Janice Drakich, *In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood*, 3 CAN. J. WOMEN & L. 69, 85-87 (1989) (reviewing the 1988 study). In today's capitalist society, the construction of worker presupposes that he is a man who has a woman, a housewife, to take care of his daily needs. *See* PATEMAN, *supra* note 2, at 131. The housewife does not conform to this ideal worker image. *See id.* at 135. Her workplace disadvantage relative to her husband remains largely unacknowledged in family law.

246. *See* Czapanskiy, *supra* note 124, at 1453-55; FINEMAN, *supra* note 108, at 25-27 & nn. 23 & 24; Fineman, *supra* note 180, at 2199-2200. As Fineman notes, "a primary focus now is on women as economic actors, a role that requires a degree of independence that is difficult, if not impossible, to reconcile with the demands of 'traditional' motherhood." FINEMAN, *supra* note 108, at 68; *see also* ARENDELL, *supra* note 14, at 61-63; KATHLEEN GERSON, *HARD CHOICES: HOW WOMEN DECIDE ABOUT WORK, CAREER, AND MOTHERHOOD* (1985); KIRP ET AL, *supra* note 5, at 18; Arendell, *supra* note 229, at 124-25, 128-29; Elizabeth Smith Beninger & Jeanne Wielage Smith, *Career Opportunity Cost: A Factor in Spousal Support Determination*, 16 FAM. L.Q. 201, 207 (1982); Corcoran et al., *supra* note 19, at 234; Ellman, *supra* note 182, at 4 n.2; Estin, *supra* note 182, at 746-47. Estin notes that an implicit presumption of self-sufficiency surrounds younger caregivers and precludes their eligibility for spousal maintenance. *See* Estin, *supra* note 182, at 743-44.

247. *See generally* ARENDELL, *supra* note 14, at 61-63; FINEMAN, *supra* note 196, at 5; WEITZMAN, *supra* note 14, at 342, 355 (finding that the presence of children in the divorced woman's household depresses

Formal equality disregards the inevitable dependency of children upon women and the dependency of women that results from their caregiving burdens.²⁴⁸

Belying women's worlds,²⁴⁹ equality rhetoric supports the perception that women do not need spousal maintenance,²⁵⁰ making it harder for women to obtain maintenance at divorce.²⁵¹ Moreover, the law currently expresses a preference for a "clean break" at divorce.²⁵² At

her opportunities for economic betterment).

248. Fineman argues that the family rather than the state is currently the repository of "inevitable dependencies"—those associated with being a child, and those that often accompany age, illness, or disability. Within families, the burden of providing the care needed by those who are inevitably dependent is disproportionately allocated to women. This disproportionate allocation in turn creates the "derivative dependency" of women, who require some social structure to support them in the performance of their care-giving tasks. See FINEMAN, *supra* note 108, at 25-26, 161-63.

249. In criticizing the feminist strategy of formal equality, Fineman argues that any theory that seeks to change women's lives and women's relationship to our patriarchal culture must capture women's gendered experiences—not deny them. See FINEMAN, *supra* note 196, at 4.

250. For a period, judges became so enthralled with this idea that they nearly stopped awarding spousal maintenance altogether, even to long-term homemakers with few skills to offer potential employers. See WEITZMAN, *supra* note 14, at 170-71; see also Arendell, *supra* note 229, at 25; Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in DIVORCE REFORM AT THE CROSSROADS 75, 93 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

251. See *Florida Gender Bias Report*, *supra* note 43, at 814-16. Attitudes toward maintenance also are undoubtedly shaped by devaluation of women's work within the family. Maintenance can be partially justified by the desirability of providing optimal child care-taking services. These services can be more difficult for mothers to offer at optimal levels if mothers must work full-time outside the home. Maintenance as a vehicle for enhancing mothers' abilities to care for their children seems justified. If these care-taking services are devalued, however, maintenance seems less justified. Many commentators argue that "work associated with child rearing within the private sphere of the family has been systematically devalued." See GERSON, *supra* note 246, at 211-12; see, e.g., FINEMAN, *supra* note 108; Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 1995 WM. & MARY L. REV. 989, 993-95.

252. See, e.g., Margaret F. Brinig, *Property Distribution Physics: The Talisman of Time and Middle Class Law*, 31 FAM. L.Q. 93, 107 & n.76 (1997); Williams, *supra* note 26, at 2232-33; Thornton, *supra* note 17, at 595 (explaining how high divorce rates and the loosening of attitudes about marriage have encouraged people to think differently about marital obligations generally.) As "to death do us part" has become an unrealistic expectation, so too has the expectation of a life-long

most, the wife is entitled to short-term rehabilitative maintenance;²⁵³ judges disfavor permanent maintenance because the wife's continued dependence on her husband interferes with the clean break between spouses.²⁵⁴ Wives, or their attorneys, cannot successfully negotiate for maintenance that judges will not award.²⁵⁵

The failure of society generally, and of attorneys and judges in particular, to attribute economic value to household labor further hampers a wife's ability to secure a maintenance award.²⁵⁶ Because the economic importance of

obligation. Even when a spouse receives a maintenance award, the payor spouse frequently does not comply. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 31 (noting 1981 nationwide statistics that indicate that only 43% of women awarded maintenance received full payment and that 33% of women awarded maintenance received no payment at all) (citing U.S. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE).

253. See WINNER, *supra* note 87, at 35-36; *Florida Gender Bias Report*, *supra* note 43, at 814.

254. See KIRP ET AL., *supra* note 5, at 181-82; *Florida Gender Bias Report*, *supra* note 43, at 814-16; Jana B. Singer, *Husbands, Wives, and Human Capital: Why the Shoe Won't Fit*, 31 FAM. L.Q. 119, 120 (1997). Regan argues that the perception of men and women as either spouses or as strangers is an artificial and dysfunctional dichotomy. See Regan, *supra* note 130, at 2306-07, 2313-14.

255. Massachusetts attorneys complain that inconsistency in judicial maintenance awards hampers considerably their ability to predict a judge's response to a maintenance request. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 33.

256. Feminists have long objected to the husband's ability to exploit his wife's labors. See PATEMAN, *supra* note 2, at 133. And many legal commentators have noted the current failure of family law to attribute economic value to household labor. See, e.g., MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 32-33; Estin, *supra* note 251, at 993-95; Regan, *supra* note 130, at 2309; Williams, *supra* note 26, at 2252-53. A substantial body of academic literature attempts to correct this injustice by according value to household labor and reconceptualizing marriage in order to justify awarding to the wife a portion of her husband's post-divorce income. See, e.g., Margaret Brinig & June R. Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855 (1988); June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463 (1990); June R. Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953 (1991); Ellman, *supra* note 182; Estin, *supra* note 182; Mary E. O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 NEW ENG. L. REV. 437 (1988); Regan, *supra* note 130, at 2316-17; Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539 (1990); Carl E. Schneider, *Rethinking Alimony, Marital Decisions and*

the wife's contribution to the family remains unacknowledged, her claim of entitlement to a portion of her husband's post-divorce income carries little force.²⁵⁷ Moreover, many fail to realize that marriage may seriously compromise a wife's ability to participate in the labor market. Wives tend to subordinate their careers to those of their husbands and to assume the bulk of homemaking and childcare responsibilities.²⁵⁸ Even fewer realize that the wife loses income for each year she stays out of the work force,²⁵⁹ that her market work during marriage has little to

Moral Discourse, 1991 BYU L. REV. 197; Singer, *supra* note 254; Jana Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423 (1994); Starnes, *supra* note 230; Williams, *supra* note 26, at 2252-53.

257. See Williams, *supra* note 26, at 2241 n.62. A Massachusetts attorney represented a wife with two children under six years of age. One of the children had a chronic illness. The wife worked part-time and earned less than \$100 per week. Her husband made \$55,000 per year. The attorney told the Massachusetts Gender Bias Task Force that the judge stated "it was unconscionable for her to be taking a job like this. It was about time women learned that they had to work. His daughters were going to work." The judge awarded the wife \$200 a week for six months. He reduced the award to \$100 per week after six months so that, "she could learn a lesson." MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 33.

258. See Williams, *supra* note 26, at 2245-47 & n.91. Williams describes how wives tend to sacrifice their own market participation in order to facilitate the ideal worker status of their husbands. *Id.* at 2236-67. Williams also explains that even in two career families, couples commonly engage in a game of "chicken" over who will provide housekeeping and child care services. Due to her socialization that accords high priority to homemaking and child care, the wife typically loses this game and performs most of these functions. See *id.* at 2240-41.

259. Williams notes that wives who interrupt their careers lose an average of 1.5% of income for each year they do not participate in market labor, with college-educated wives losing as much as 4.3%. See Williams, *supra* note 26, at 2257 n.148 (citing Jacob Mincer & Solomon Polachek, *Family Investments in Human Capital: Earnings of Women*, in *ECONOMICS OF THE FAMILY* 397 (Theodore W. Schultz eds., 1974)); see also Beninger & Smith, *supra* note 246, at 207; Jacob Mincer & Solomon Polachek, *Family Investment in Human Capital: Earnings of Women*, 82 J. POL. ECON. 576, 583 (1974). Estin reports a more recent study that found a typical wage gap of 33% the first year women returned to work, with a portion of the gap made up over time. See Estin, *supra* note 182, at 746 n.87 (discussing a study by Laurence Levin and Joyce Jacobsen) (citing Laura Myers, *Women Who Interrupt Career Fall Into Pay Gap*, BOULDER DAILY CAMERA, Jan. 11, 1992, at 1A, 11A).

no effect on her financial well-being after divorce,²⁶⁰ and unless she remarries, she will suffer long-term economic costs attributable to divorce.²⁶¹ Judges typically underestimate a wife's financial vulnerability and need for spousal maintenance.²⁶²

Today spousal maintenance law is premised on the dependent spouse's need and the husband's ability to pay.²⁶³ Dependency, however, remains an unattractive concept in a society steeped in norms of autonomy and self-sufficiency.²⁶⁴ Furthermore, need has never provided a strong justification for wealth transfer in this society.²⁶⁵ Rather, those who perform market labor deserve to earn and keep their hard-earned wages.²⁶⁶ In this ideological context, a maintenance claim based on need has no compelling justification.

Like custody statutes, spousal support statutes typically list many factors a court should consider in determining how much, if any, maintenance to award.²⁶⁷

260. See Pamela J. Smock, *The Economic Costs of Marital Disruption for Young Women Over the Past Two Decades*, 30 DEMOGRAPHY 353, 367 (1993).

261. See *id.* at 366-67; see also Williams, *supra* note 26, at 2256-57 (noting that a mother's decreased earning capacity due to child care responsibilities extends beyond the children's majority).

262. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 63; *Florida Gender Bias Report*, *supra* note 43, at 814-16.

263. The Colorado maintenance statute, for instance, authorizes a court to award maintenance if the spouse seeking the award:

(a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

COLO. REV. STAT. ANN. § 14-10-114 (1998); see also *In re Marriage of Olar*, 747 P.2d 676, 677-78, 680-82 (Colo. 1987) (en banc). Not all state maintenance statutes specifically condition an award of maintenance on need. Yet today most courts disfavor maintenance, even when need seems apparent. See *infra* note 272 and accompanying text.

264. See Fineman, *supra* note 180, at 2182.

265. See Regan, *supra* note 130, at 2350-56; William Simon, *Rights and Redistribution in the Welfare State*, 38 STAN. L. REV. 1431 (1986).

266. See WEITZMAN, *supra* note 14, at 163, 183; Regan, *supra* note 130, at 2350-52.

267. Illinois law, for instance, provides that a court:

[M]ay grant maintenance only if it finds that the spouse seeking maintenance lacks sufficient property, including marital property apportioned to her, to provide for her reasonable needs; is unable to support herself through appropriate

Statutes do not prioritize or weight these factors.²⁶⁸ In a context that favors formal equality and a clean break, and ignores the financial contributions and financial vulnerability of wives,²⁶⁹ the indeterminacy of these statutes invites discrimination against women in support awards. As Weitzman notes, judges typically view the husband's income as rightfully his,²⁷⁰ despite statutory language encouraging consideration of the wife's contributions as homemaker.²⁷¹ Current law focuses on the wife's need, resulting in decisions in which wives who earn \$12,000 to \$20,000 a year are found to have no "need" for alimony, irrespective of their husbands' ability to pay.²⁷² Other judges believe maintenance is not appropriate because they believe the wife will remarry.²⁷³ In the words of one judge:

Alimony was never intended to assure a perpetual state of secured

employment; or is otherwise without sufficient income. Maintenance is to be awarded in such amounts and for such periods of time as the court deems just, after consideration of various factors, including the following: the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; the standard of living established during the marriage; the age and the physical and emotional condition of both parties; and the ability of the spouse from whom maintenance is sought to meet his or her needs while meeting those of the spouse seeking maintenance.

In re Marriage of Harding, 545 N.E.2d 459, 469 (Ill. App. Ct. 1989) (citations omitted); see also *In re Marriage of Frederick*, 578 N.E.2d 612, 620 (Ill. App. Ct. 1991) (finding that the court should also consider the tax consequences to each party of a maintenance award).

268. See *supra* note 267.

269. Many attorneys believe that many judges have an unrealistic view of the dependent spouse's ability to become self-sufficient. See *Missouri Gender Bias Report*, *supra* note 43, at 546-50.

270. WEITZMAN, *supra* note 14, at 163, 183; see also Singer, *supra* note 254, at 124; Williams, *supra* note 26, at 2234, 2250-52.

271. See Estin, *supra* note 182, at 748 & n.93, 749-54, Starnes, *supra* note 230, at 95-96; Williams, *supra* note 26, at 2234, 2252.

272. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 30-32; Williams, *supra* note 26, at 2252 n.120 (citing *Luedke v. Luedke*, 487 N.E.2d 133 (Ind. 1985); *Rohling v. Rohling*, 379 N.W.2d 519 (Minn. 1986)).

273. One attorney in Missouri reported that two different judges refused to order spousal maintenance for his client because she was young and attractive and the judges believed she would remarry. See *Missouri Gender Bias Report*, *supra* note 43, at 542.

indolence. It should not be suffered to convert a host of physically and mentally competent young women into an army of alimony drones, who neither toil nor spin, and become a drain on society and a menace to themselves.²⁷⁴

We begin to understand why wives have difficulty obtaining maintenance during negotiation. The realities of divorce law practice contribute additional obstacles. If the wife cannot or does not hire an attorney, she may be unaware of her right to spousal support. Even if she knows the law, as noted earlier, many circumstances suggest her weakness in negotiations with her more powerful husband.²⁷⁵ If the wife does hire a lawyer, her counsel likely will urge settlement.²⁷⁶ Husbands typically resist spousal maintenance,²⁷⁷ making settlement difficult if maintenance is demanded. Judicial reluctance to award maintenance compounds the problem. The lawyer cannot credibly threaten trial on the issue when everyone knows the judge likely will not award maintenance, or will not award enough to make the struggle worthwhile.²⁷⁸ Moreover, some lawyers believe that property is more valuable than maintenance.²⁷⁹ These circumstances create disincentives for lawyers to demand maintenance and suggest that lawyers are likely to encourage their clients to abandon or

274. See Samuel H. Hofstadter & Shirley R. Levittan, *Alimony—A Reformulation*, 7 J. FAM. L. 51, 55 (1967).

275. In her 1984 study of divorce cases in three New York counties, Garrison found that not one spousal maintenance award was entered when neither party was represented by counsel. When wives did have lawyers, they were awarded maintenance in 30% of the cases. See Garrison, *supra* note 14, at 710.

276. See *infra* note 381 and accompanying text.

277. See WEITZMAN, *supra* note 14, at 160-61.

278. Anticipation of what the court will do is a bargaining chip in negotiation. See Galanter, *supra* note 8, at 168-69. As one lawyer stated to his male divorce client:

We ought not to be offering too much. Precedent seems to be more generous than judges are in paying spousal support. As much as you are concerned right now about what she might be getting, the judges are really not generous at all. This is a somewhat conservative county and there's a backlash for a woman to go out and do whatever a man can. So why not? Why can't she go and take care of herself? You take care of yourself.

SARAT & FELTSTINER, *supra* note 128, at 125; see also Melli et al., *supra* note 15, at 1143-44.

279. See WEITZMAN, *supra* note 14, at 162.

compromise requests for support.²⁸⁰ In the end the substance and the application of maintenance statutes do little to level the uneven playing field of divorce.

C. Property Distribution

The "clean break" rationale favors the use of property distribution rather than maintenance to achieve financial equity between spouses.²⁸¹ A maintenance award perpetuates a relationship between ex-spouses; property distribution does not.²⁸² Marital property in most states is subject to equitable distribution.²⁸³ Again we encounter statutory indeterminacy²⁸⁴ and biased judicial discretion²⁸⁵

280. See *id.* (finding that attorneys for wives most commonly counseled their clients to forget about maintenance and to get on with building their new lives). The Massachusetts Gender Bias Task Force discovered that attorneys sought alimony in only 29% of their divorce cases. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 30; see also *In re Marriage of Flynn*, 597 N.E.2d 709, 712-13 (Ill. App. Ct. 1992) (finding that a 67 year old wife with poor health agreed to waive her maintenance rights largely because she believed it was the best she could do under the circumstances). But see Garrison, *supra* note 14, at 710 (noting that her data suggest that legal representation may account for the success of some wives in obtaining spousal maintenance).

281. See, e.g., Garrison, *supra* note 14, at 623, 629; Regan, *supra* note 130, at 2313-15 & n.39. See generally *In re Flynn*, 597 N.E.2d at 173. See Regan, *supra* note 130, for a thoughtful discussion of the limitations property rhetoric can impose on law's ability to establish financial equity between divorcing spouses.

282. See Regan, *supra* note 130, at 2306, 2319. This rationale is used to disfavor maintenance even when spouses undoubtedly will remain related because they share children. Moreover, the implicit contradiction between conceptualizing ex-spouses as strangers for purposes of financial issues and simultaneously demanding that ex-spouses remain cooperative parents generally lacks acknowledgement in the law. Scott suggests that the "clean break" rationale also may discourage some parents from continuing to support their children after divorce. See Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 36 (1990).

283. Community property states now commonly permit deviation from the prior requirement of equal division of property, making them similar to equitable distribution states. See Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Of Welfare Reform, Child Support, and Relocation*, 30 FAM. L.Q. 765, 808, tbl. 5 (1990).

284. Illinois law, for instance, directs courts to consider:

[E]ach spouse's contribution to or dissipation of the marital property; the value of the property set apart to each spouse; the

that results in wives frequently receiving fewer marital assets than husbands.²⁸⁶ Even if marital assets were equally divided, as they still are in some community property states,²⁸⁷ equality might once again mask inequity.²⁸⁸

First, if the wife's financial prospects are inferior to those of her husband's, she may need more than half of the marital property.²⁸⁹ Under current definitions of marital property,²⁹⁰ most divorcing couples have little property to

duration of the marriage; the relative economic circumstances of the parties; the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties; the custodial provisions for any children; whether the apportionment is in lieu of or in addition to maintenance; the opportunity of each spouse for future acquisition of capital assets and income; and the tax consequences of the property division upon the respective economic circumstances of the parties.

In re Marriage of Harding, 545 N.E.2d 459, 465 (Ill. App. Ct. 1989).

285. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 33-36; Williams, *supra* note 26, at 2273-75.

286. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 33-36; *Florida Gender Bias Report*, *supra* note 43, at 816-18; Isabel Marcus, *Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 BUFF. L. REV. 375, 462-67 & n.342 (1988-89) (finding that appellate cases reveal that wives receive fewer marital assets than do husbands and that settlements reflect this pattern); Schafran, *supra* note 92, at 188. Williams argues that the unspoken "he who earns it owns it" rule governs property distribution in equitable distribution states. See Williams, *supra* note 26, at 2251. Ellman notes that some equitable distribution states employ a presumption in favor of the equal division of marital property, but that in practice wives still receive less than one-half of the marital assets. See IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 234 (2d ed. 1991); see also WINNER, *supra* note 87, at 41-42. Some researchers, however, have detected a trend toward equal distribution of marital assets in equitable distribution states. See Garrison, *supra* note 14, at 673. But see WEITZMAN, *supra* note 14, at 106-07 (citing studies by researchers who have not detected this trend). Courts constantly remind that equitable distribution does not require an equal distribution. See, e.g., *In re Harding*, 545 N.E.2d at 465.

287. See Garrison, *supra* note 14, at 636 & n.55 (noting that California, Louisiana, and New Mexico mandate equal property division).

288. See Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827, 854-57, 861-64 (1988) (observing that courts rarely distribute property to address financial need, despite statutory authorization to do so).

289. See Schafran, *supra* note 92, at 189-90.

290. Nearly every state defines as marital all property acquired by

distribute.²⁹¹ Unless a couple is wealthy, the marital property of a couple married for many years generally consists of equity in a marital home.²⁹² Moreover, today's more expansive definition of marital property stops short of embracing a spouse's enhanced earning capacity²⁹³ or the

either spouse during the marriage, with the exceptions of property obtained by gift or through inheritance. During the past several decades most jurisdictions have expanded their definition of marital property to encompass property titled solely in one spouse's name, pension and retirement plans, business and celebrity goodwill, and in a few jurisdictions, increased value of separate assets. Under extreme circumstances, a few states allow judges to award the separate property of one spouse to the other spouse upon divorce.

291. See *Florida Gender Bias Report*, *supra* note 43, at 818; Garrison, *supra* note 14, at 662, 667 (finding that the median net worth of marital property in a 1984 sample of contested divorce cases was \$23,591 and that much of that property consisted of non-liquid assets like furniture and cars); Rhode & Minow, *supra* note 229, at 202 (noting that more than 50% of divorcing couples have no significant marital assets); Starnes, *supra* note 230, at 84-87 (noting that marital assets rarely are sufficient to ease the financial problems of divorced women). As Singer explains:

Feminist analysis and human capital theory have also combined to demonstrate that traditional definitions of marital property fail to account for a substantial portion of the assets accumulated during marriages. Thus, relying on equitable distribution principles is unlikely to achieve an equitable sharing of costs and benefits in a substantial number of divorces.

Singer, *supra* note 254, at 122.

292. See WEITZMAN, *supra* note 14, at 66, 78-79. Weitzman explains that the most valuable, or only, marital property of middle-income couples (who make up approximately one-half of the divorcing population) is usually the marital home. Lower income couples in short marriages typically do not own homes, whereas wealthy couples have other assets in addition to the marital home. See *id.* at 66. Specifically Weitzman found that the family home was the major asset for 46% of the divorcing couples and that the median equity in the family home was approximately \$33,000 in 1978 dollars, or \$53,100 in 1984 dollars. See *id.* at 61-62. Moreover, less than one-quarter of the divorcing couples had a pension, and only one in nine had a business or other real estate. See *id.* at 80; see also MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 33-34 (finding that the marital estate often consists of a marital home and few other assets); WINNER, *supra* note 87, at 38-39; Garrison, *supra* note 14, at 665 (finding in her 1984 study of New York divorce cases that the marital home was by far the most valuable asset in most contested cases).

293. See Arendell, *supra* note 229, at 131-32; Deborah A. Batts, *Remedy Refocus: In Search of Equity in "Enhanced Spouse/Other Spouse" Divorces*, 63 N.Y.U. L. REV. 751, 751-53, 757 (1988); Regan,

spouse's post-divorce income,²⁹⁴ arguably the most significant²⁹⁵ or only types of marital wealth.²⁹⁶ Excluding a spouse's post-divorce income whether or not enhanced from marital property, skews the distribution at divorce and invites impoverishment of the more dependent spouse, particularly when maintenance is disfavored and infrequent.²⁹⁷ Consequently, under current distribution

supra note 130, at 2361-62. *But see Batts, supra*, at 771-77 (noting that Wisconsin and New York, in particular, have dealt more comprehensively and sensitively with the issue). Courts explain that enhanced earning capacity is not property because it lacks the traditional attributes of property. *See Regan, supra* note 130, at 2362. It cannot, for instance, be assigned, sold, transferred, conveyed or pledged. *See Batts, supra* at 759. Enhanced earning capacity also lacks the attribute of joint ownership because it is "personal" to the holder and it has no current exchange value because it is a mere expectancy of future income. *See id.* Courts also justify their refusal to treat enhanced earning capacity as marital property because of valuation difficulties. *See id.* at 777-78. Moreover, because property awards are not modifiable, some courts express concern about possible injustice if the court's projection of future earnings proves inaccurate. *See Regan, supra* note 130, at 2363-64; *Batts, supra* note 272, at 779-81. For discussion of the inadequacy of these explanations, see *Batts, supra* note 272, at 760-64.

294. *See Florida Gender Bias Report, supra* note 43, at 818.

295. *See Garrison, supra* note 14, at 663-64 (noting that the low value of marital property found in her study contrasted dramatically with the high value of family income).

296. *See Batts, supra* note 293, at 752.

297. *See WEITZMAN, supra* note 14, at 110-11, 388 (noting that failure to include "career assets" in the marital estate skews the property distribution in favor of the primary working spouse and assures an inequitable division of marital property). Some jurisdictions claim to correct for this injustice by taking enhanced earning capacity into account when distributing the marital property and awarding spousal maintenance. *See, e.g., In re Marriage of Graham*, 574 P.2d 75 (Colo. 1975). Reimbursement maintenance, for instance, returns to one spouse the financial contributions he or she made to the education of the other spouse. *See, e.g., Mahoney v. Mahoney*, 453 A.2d 527 (N.J. 1982). This crude attempt at equity, however, does not capture the value that financial contribution was designed to have for both spouses. Arguably, the spouse who supported the other through years of graduate or professional education anticipated that they both would benefit from his or her enhanced earning capacity. Had the supporting spouse known that the highly educated spouse would leave upon graduation, he or she would not have agreed to provide support. He or she might have chosen to pursue his or her own advanced degree. Rehabilitative alimony also provides an inadequate remedy because the spouse who supported the enhanced spouse likely is self-sufficient and not "in need" of maintenance. *See Batts, supra* note 293, at 768-69.

laws, a wife may at most be entitled to half the value of limited assets; formal equality again masking inequity.

III. THE SPECIAL CASE OF THE ABUSED WIFE

Many wives suffer physical and/or emotional abuse from their husbands,²⁹⁸ and a high percentage of divorcing wives have most likely been abused.²⁹⁹ Abused wives face nearly insurmountable problems negotiating fair divorce

Moreover, the recipient spouse's remarriage terminates rehabilitative alimony.

298. See Mahoney, *supra* note 192, at 10-11. Some estimate spousal abuse occurs in at least one-fourth to one-third of marriages. See MURRAY A. STRAUSS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 32 (1980); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1210 (1993); Murray A. Straus & Richard J. Gelles, *How Violent are American Families? Estimates from the National Family Violence Resurvey and Other Studies*, in PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8, 145 FAMILIES 110 (Murray A. Straus & Richard J. Gelles eds. 1990). Others estimate spousal abuse occurs in one-half to two-thirds of all marriages. See *Florida Gender Bias Report*, *supra* note 43, at 848 & n.225; Laurie Woods, *Litigation on Behalf of Battered Women*, 7 WOMEN'S RTS. L. REP. 39, 41 (1981). Repeated severe violence occurs in one of 14 marriages. See JAFFE ET AL., *supra* note 210, at 19. Some criticize Straus and Gelles' findings for underestimating the incidence of marital violence. See Fischer et al., *supra* note 133, at 2124-25 & n.44, 2137 & n.97.

299. See Fischer et al., *supra* note 133, at 2142; Linda K. Girdner, *Custody Mediation in the United States: Empowerment or Social Control?*, 3 CANADIAN J. WOMEN & L. 134, 138 n.19 (1989) (noting studies in which 50% to 75% of the women gave physical violence as a reason for marital separation); Joan S. Meier, *Notes From the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1304 & n.24 (1993) (finding that approximately two-thirds of divorced or separated women report violence in their former relationships) (citing Irene Frieze & Angela Browne, *Violence in Marriage*, in FAMILY VIOLENCE 177-80 (Lloyd Ohlin & Michael Tonry eds., 1989)); Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273 (1995) (noting that although divorced and separated women comprise only 10% of all American women, they represent 75% of all battered women and report being battered 14 times as often as women still living with partners) (citing CAROLINE WOLF HARLOW, U.S. DEPT' OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIME 5 (Jan. 1991)).

settlements. This section first explores those problems and then explains why a battered woman's rational fear of losing custody of the children further compromises her negotiation strength.

Although most husbands exercise the lion's share of control over marital finances, abusive husbands typically exercise extreme financial control.³⁰⁰ A battered wife frequently lacks the funds she needs to hire an attorney and adequately develop her case.³⁰¹ Moreover, her abuser likely has compromised her work performance and participation, making her a difficult employee.³⁰² After separation, she may still have difficulty locating employment and earning the funds she needs to hire a lawyer.³⁰³ Finally, the battered wife may lack the financial knowledge necessary to accurately assess her financial needs and develop a realistic post-divorce financial plan.

The abuser's role as rule maker and enforcer³⁰⁴ further compromises a battered wife's ability to negotiate a fair divorce settlement. Typically, abusive husbands establish

300. See LENORE E. WALKER, *THE BATTERED WOMAN* 129-44 (1979); Fischer et al., *supra* note 133, at 2121 & n.17; Roberta L. Valente, *Addressing Domestic Violence: The Role of the Family Law Practitioner*, 29 FAM. L.Q. 187, 189 (1995).

301. Many battered women cannot afford legal representation. See Czapanskiy, *supra* note 86, at 250 & n.11.

302. As Zorza notes:

Working is effectively foreclosed to many battered women because abusers often sabotage their efforts to get to their jobs or continue to abuse them while they are at work. Seventy-four percent of battered women who work report that they are harassed on the job by their abusers. Abusive men cause over half of working battered women to be late for work at least sixty days a year, and over half to miss at least thirty-six full days of work annually. Twenty percent of all employed battered women lose their jobs because their abusers so harass them on the telephone or in person at work.

Zorza, *supra* note 299, at 277 (footnotes omitted); see also Keenan, *supra* note 197, at 426; Valente, *supra* note 300, at 189.

303. A study of protective order petitions filed in a Pennsylvania county during 1990 revealed that 45% of the petitioners were unemployed and that their personal income averaged only \$535 per month. See Edward W. Gondolf et al., *Court Response to Petitions for Civil Protection Orders*, 9 J. INTERPERSONAL VIOLENCE 503, 508 (1994). Moreover, the judges hearing the protective order petitions minimally granted the financial relief the petitioners requested. See *id.* at 510-12; see also Czapanskiy, *supra* note 86, at 253 & n.16.

304. See Fischer et al., *supra* note 133, at 2126-29.

stringent rules that govern their wife's and their children's behavior.³⁰⁵ These rules demand that the wife focus exclusively and continually on fulfilling the batterer's needs, however he defines them. Abused wives frequently internalize these rules.³⁰⁶ Moreover, to avoid the violence that results if they challenge or break these rules,³⁰⁷ many battered women routinely comply with the batterer's articulated or anticipated demands.³⁰⁸ At divorce, a woman who believes that she has survived by fulfilling the batterer's needs and complying with his rules may have extreme difficulty identifying and asserting her own interests during negotiations.³⁰⁹ She may also fear additional violence if she fails to comply with his divorce demands.³¹⁰

The risk of violence escalates when the abused wife attempts to break the abuser's control by leaving him.³¹¹ She may sense this heightened danger³¹² and hesitate to make

305. See *id.*

306. See *id.* at 2129-30; *Florida Gender Bias Report*, *supra* note 43, at 851; Pagelow, *supra* note 220, at 74.

307. See Fischer et al., *supra* note 133, at 2131-37.

308. See Dutton, *supra* note 298, at 1227.

309. See Becker, *supra* note 190, at 18; Pagelow, *supra* note 220, at 74.

310. See Dutton, *supra* note 298, at 1232; Pagelow, *supra* note 220, at 74.

311. See Catharine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 815-16 (1993); Mahoney, *supra* note 192, at 5-7, 65-68 (naming this phenomenon "separation assault"). The abuser may direct the violence at his wife, her children, and/or her family. As Pagelow notes:

When a battering victim takes the first steps toward freedom, the abuse frequently escalates to deadly intensity. An abused woman may be most at risk of femicide when she leaves or when it becomes clear to her spouse that she will be leaving for good. The most common type of retaliation is against the woman herself, stalked and killed by "obsessive" mates; other times it results in murder-suicide. Murder-suicide most frequently occurs between husband and wife, and is almost always perpetrated by the male who first kills his wife, girlfriend, or estranged partner. Batterers also murder or attempt to murder their own children for revenge when victims try to get away, and occasionally they also carry out their threats against their wives' families.

Pagelow, *supra* note 220, at 72 (citations omitted); see also Fischer et al., *supra* note 133, at 2138-39.

312. See Pagelow, *supra* note 222, at 71-72. Sometimes for years

any request for property or maintenance that will ruffle his feathers —trading, in her mind, her life for their assets. Additionally, a batterer frequently isolates his victim from family and friends,³¹³ depriving her of the emotional support she might need to confront him. Many abused wives are also averse to risk, feel guilty about fracturing the family,³¹⁴ suffer low self-esteem³¹⁵ and depression,³¹⁶ have low expectations,³¹⁷ feel terror,³¹⁸ have difficulty concentrating,³¹⁹ and are frequently passive.³²⁰ Each of these characteristics severely compromises a person's ability to negotiate effectively.³²¹

If a battered woman can afford an attorney, the foregoing makes her a difficult client to represent.

prior to their wives' departure, abusive husbands threaten their victims that any attempt to leave will be met with violence toward them, their children, or their families. *See id.* at 72; *see also* Dutton, *supra* note 298, at 1232.

313. *See* JAFFE ET AL., *supra* note 210, at 23, 26; SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 219-44 (1982); Fischer et al., *supra* note 133, at 2132; Pagelow, *supra* note 220, at 70 (describing a systematic pattern of withdrawal from relations with family and friends).

314. *See* Becker, *supra* note 190, at 18 (noting that battered women frequently learn from religious training or from their families of origin that they are responsible for the quality of the marriage and for keeping the family together).

315. *See* JAFFE ET AL., *supra* note 210, at 23; MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 83; WALKER, *supra* note 300, at 32; Dutton, *supra* note 298, at 1218-19, 1221; Valente, *supra* note 300, at 191.

316. *See* Dutton, *supra* note 298, at 1216, 1221.

317. *See id.* at 1218-19.

318. *See id.* at 1221.

319. *See id.*

320. *See generally* LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984); WALKER, *supra* note 300; Pamela Choice & Leanne K. Lamke, A Conceptual Approach to Understanding Abused Women's Stay/Leave Decisions, 18 J. FAM. ISSUES 290 (1997); Desmond Ellis, Marital Conflict Mediation and Post-Separation Wife Abuse, 8 LAW & INEQ. J. 317, 331 (1990); Sherry L. Hamby & Bernadette Gray-Little, Responses to Partner Violence: Moving Away from Deficit Models, 11 J. FAM. PSYCHOL. 339, 340 (1997); Keenan, *supra* note 197, at 418. Many battered women, however, also rebel and resist the batterer's pervasive control. *See* Fischer et al., *supra* note 133, at 2133-37. Moreover, many scholars and researchers persuasively argue that passivity is only one of many symptoms that battered women may exhibit. *See, e.g.,* Hamby & Gray-Little, *supra*, at 340-41, 347-49; Mahoney, *supra* note 192.

321. *See* Bryan, *supra* note 76, at 457-81.

Moreover, her attorney may inadequately represent her interests.³²² Many abused wives resist identifying themselves as abused.³²³ An uneducated lawyer may not discover the abuse.³²⁴ If a wife does reveal abuse, many lawyers will disbelieve her or minimize the importance of the violence.³²⁵ Even lawyers who believe their clients frequently fail to bring the abuse to the court's attention.³²⁶ If a judge does not know a wife has experienced abuse, she or he may misapprehend the wife's and the children's financial and safety needs. The judge may also misunderstand the wife's mental condition, testimony, or behavior, compromising the wife's case.

If the battered wife and her abusing husband settle their divorce dispute through mediation, the likelihood of an unfair custody and/or financial agreement increases. Although mediators claim that they can balance power, perhaps by meeting separately with each spouse, the extreme power disparities between an abused wife and her violent husband defy balancing.³²⁷ Many mediators who

322. See The Family Violence Project of the National Council of Juvenile and Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197, 212-14 (1995) [hereinafter *Family Violence in Child Custody Statutes*] (noting the inadequate legal representation frequently provided to domestic violence victims); Valente, *supra* note 300, at 187, 190;

323. See Fischer et al., *supra* note 133, at 2139-41; Mahoney, *supra* note 192, at 8 n.29; Minow, *supra* note 212, at 1686; Pagelow, *supra* note 220, at 70, 76; Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 530 (1992); Valente, *supra* note 300, at 187.

324. See *Family Violence in Child Custody Statutes*, *supra* note 322, at 212 (noting that lawyers fail to identify domestic violence victims); Klein & Orloff, *supra* note 311, at 814 (acknowledging that few lawyers attempt to determine whether their clients have suffered domestic violence).

325. See Czapanskiy, *supra* note 86, at 257.

326. See *id.*; *Family Violence in Child Custody Statutes*, *supra* note 322, at 213-14.

327. Many commentators reveal the problems battered wives confront in divorce mediation. See MASSACHUSETTS GENDER BIAS REPORT, *supra* note 43, at 94; Bryan, *supra* note 88, at 203-05; Fischer et al., *supra* note 133; Andree G. Gagnon, *Ending Mandatory Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272 (1992); Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317 (1990);

Keenan, *supra* note 197, at 437-38; Daniel G. Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse*, 39 SOC. WORK 51, 55 (1994). Gerencser provides one example:

A recent family mediation began with the father shouting, "Do you know what I'd do if my son ever came home with an earring? I'd cut off his ear." He was responding to the mother's request that he stop berating their son. This outburst was no surprise. In a pre-mediation screening questionnaire, the mother said the father had abused her. Although she wanted to try mediation, she was unsure whether she could participate on an equal basis with the father. As the mediation progressed, the mother willingly acquiesced to the father's visitation demands in his presence. However, she said privately that she did not want him near her or their children, and that she had agreed to his demands only because she was afraid of him. The mediation ended in an impasse, with no reported mention of the father's abusive history or the mother's fear of further abuse based on her conduct at the mediation.

Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 FLA. ST. U.L. REV. 43, 43 (1995). Gerencser does believe that some battered spouses can successfully mediate, but she also recommends that states provide sophisticated procedures for screening for domestic violence and exemptions from mediation for battered women. *See id.* at 55-60. Consider also one battered woman's experience in mediation:

In court-ordered mediation we were told to cooperate and communicate in regards to the children. He took this one step further and used this to continue to harass me . . . On the way home from our last mediation session of which we were told to ride to and from together—cooperation as they say—he got extremely agitated over something that I said in mediation. I had made the mistake of feeling safe enough to say how I really felt. [I thought] this would help the mediator to see what a mess I was really living in. I did not know about power and control at that time . . . I dropped him off at his mother's house and he threw the papers the mediator gave us—these were contracts—and cussed me out later that evening around midnight. He broke into our apartment and started going through my things. He said he was looking for evidence that I was having an affair. This was his reason for our marriage to be ending, nothing about the abuse. When I realized there was something wrong in my apartment, I got up to investigate. He then struggled with me, slapping me and kicking me. He threw me to the floor and screamed at me that he was going to have me one last time. I was raped at knife point that night while my children were in the next room. Mediation is extremely dangerous when domestic violence is evident. If people who are ending relationships had equal power and could communicate, they would not need mediation. In cases where there is domestic violence, this never occurs. Mediation is set up with the idea that reasonable rational people will be participating in it.

WISCONSIN GENDER BIAS REPORT, *supra* note 100, at 210.

claim knowledge about and sensitivity to domestic violence suffer from the same misperceptions of battered women as judges, lawyers, and mental health professionals.³²⁸

Mothers frequently leave their batterers in order to protect their children.³²⁹ Their abusive husbands, however, commonly threaten to take the children if their wives leave them.³³⁰ At divorce, a battered mother most likely anticipates and fears a custody dispute. Many batterers do pursue child custody as a way to perpetuate control over their victims.³³¹ A battered mother's fear of provoking or losing a custody dispute can cause her to accept a custody or visitation arrangement that offers her and the children insufficient protection.³³² Her fear may also make her unwilling to push for fairness on financial issues.³³³ The many factors that compromise her case for custody lend credence to her fear.³³⁴

328. The Colorado Women's Bar Association recently invited me to participate on a panel addressing mediation in divorce cases involving domestic violence. One of the panelists was a woman lawyer-mediator who advocated mediation for dissolving violent marriages and who claimed great sensitivity to domestic violence issues. In a spontaneous burst of candor, however, she stated that "violence was a two-way street," clearly implying to all present that the responsibility for the violence lay equally at the feet of the violent husband and the abused wife. The audience emitted a gasp of disbelief. Fortunately, this woman exposed what I frequently find; mediators talk a good game, but they lack the knowledge and the ability to address domestic violence issues in divorce mediation.

329. See, e.g., Saunders, *supra* note 327, at 54.

330. See JAFFE ET AL., *supra* note 210, at 107; Becker, *supra* note 190, at 28; Keenan, *supra* note 197, at 422-23.

331. See Czapanskiy, *supra* note 86, at 257; Fischer et al., *supra* note 133, at 2159-60; Mahoney, *supra* note 192, at 43-44; Meier, *supra* note 299, at 1308 n.40; Pagelow, *supra* note 222, at 74; Schneider, *supra* note 323, at 555.

332. See Saunders, *supra* note 327, at 56 (noting that a battered mother's fear of looking bad in a sole custody trial may encourage her to agree to a dangerous joint custody arrangement).

333. See Fischer et al., *supra* note 133, at 2160; Keenan, *supra* note 197, at 413, 423-24; Mahoney, *supra* note 192, at 43-48; Pagelow, *supra* note 222, at 74. The battered wife also may return to the batterer in order to avoid the risk of losing custody.

334. See Mahoney, *supra* note 192, at 44 n.199 (discussing studies confirming high percentages of custody awards to fathers who battered their wives); see also CHESLER, *supra* note 45, at 79 tbl.6 (finding that 59% of the fathers in her study who won custody in litigation had abused their wives and that 50% of the fathers who obtained custody through private negotiations had abused their wives).

Judicial and lawyer ignorance and attitudes about domestic violence pose the first problem.³³⁵ The law of many states now provides that evidence of domestic violence is relevant to a custody determination.³³⁶ Many judges and lawyers, however, routinely ignore these provisions.³³⁷ Frequently, judges do not believe the wife's allegations of domestic violence³³⁸ and many times she lacks the requisite proof to change the court's mind.³³⁹ Because of the veil of secrecy that typically surrounds a violent family, the wife frequently cannot offer corroborating witnesses.³⁴⁰ Medical records may also fail to confirm the violence because batterers and their wives commonly provide alternative explanations for her injuries,³⁴¹ and the medical profession remains insensitive to domestic violence issues.³⁴² Many

335. See *Family Violence in Child Custody Statutes*, *supra* note 322, at 212-14, 216-18; Klein & Orloff, *supra* note 311, at 811-14.

336. See Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1058-59 (1991); *Family Violence in Child Custody Statutes*, *supra* note 300, at 199-01, 208-10; Leslie D. Johnson, *Caught in the Crossfire: Examining Legislative and Judicial Response to the Forgotten Victims of Domestic Violence*, 22 L. & PSYCHOL. REV. 271, 276-77 (1998); Lynne R. Kurtz, Comment, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 ALB. L. REV. 1345, 1348 (1997) (noting that the custody statutes of 44 states and the District of Columbia have provisions relating to domestic violence); Meier, *supra* note 299, at 1304, 1309; Pagelow, *supra* note 222, at 76. Eleven states have presumptions against awarding custody of a child to a batterer. See Kurtz, *supra*, at 1350. Many of these presumptions, however, provide trial courts with wide discretion, diminishing their effectiveness. See *id.* at 1367 & nn.151-55, 1368-72.

337. See Czapanskiy, *supra* note 86, at 249, 255-58; Klein & Orloff, *supra* note 311, at 958 (concluding that gender bias studies suggest that one-half of the sitting judiciary resists considering domestic violence in custody litigation).

338. See Becker, *supra* note 190, at 17; Czapanskiy, *supra* note 86, at 249, 252, 254-56 & n.19; Mahoney, *supra* note 192, at 11-12 (noting that denial of wife abuse permeates the legal system); Meier, *supra* note 299, at 1308, 1310; Pagelow, *supra* note 222, at 73.

339. See Pagelow, *supra* note 222, at 72.

340. See *id.* at 70; see also Fischer et al., *supra* note 133, at 2139.

341. See Pagelow, *supra* note 222, at 70.

342. Reviewing current research, Coleman and Stith describe the results as follows:

[T]he medical response to abuse has been slow and sporadic." Researchers examining this phenomenon have documented a continuing pattern of nonassessment, nondetection, and

battered women never call the police,³⁴³ so police records cannot confirm the abuse.³⁴⁴ Even if police records do exist, the batterer and his victim typically minimize the violence.³⁴⁵ In response to women's allegations of domestic violence, judges commonly issue mutual restraining orders, implying that the husband's violence is equivalent to the wife's.³⁴⁶ Consequently, evidence of the existence, frequency, and severity of the abuse becomes a liar's contest between the abusive husband and his wife³⁴⁷—a contest she frequently loses.

Judges, who do believe that violence occurred, generally minimize its importance³⁴⁸ and its relevance to child

nonintervention. Research has demonstrated that health professionals chronically failed to question the source of a woman's injury, ignored indications that domestic violence was occurring, were unable to recognize a possible relationship between abuse and many recurrent, nontraumatic physical and psychological problems, and finally, labeled and denigrated the woman if abuse was revealed. In turn, battered women have found the health care community to be insensitive and not particularly helpful.

Jean U. Coleman & Sandra M. Stith, *Nursing Students' Attitudes Toward Victims of Domestic Violence as Predicted by Selected Individual and Relationship Values*, 12 J. FAM. VIOLENCE 113, 114 (1997) (citations omitted). Consistent with research on other populations, these researchers found that sex role egalitarianism and a high level of perceived person control over life events correlated positively with nursing students' sympathy for battered women. *See id.* at 129-30.

343. The police are called in on only approximately two percent of woman beatings. *See* Pagelow, *supra* note 222, at 72. Additionally, battered wives are less likely than other battered women to call the police. *See id.*; *see also* Dutton, *supra* note 298, at 1229.

344. In some states the police officers' failure to arrest compounds the problem. *See Florida Gender Bias Report*, *supra* note 43, at 855-57. The Gender Bias Study Commission in Florida provided examples:

In Alachua County, for example, women have been told "to give him some [sex] and he won't need to beat you." In DeSoto County, some batterers have been advised simply to "take five." In Pinellas County, officers reportedly have spent most of their response time trying to convince the victim not to press charges. From Okeechobee County, the Commission heard that the police may even arrest the victim rather than the perpetrator.

Id. at 855 (footnotes omitted).

345. *See* Pagelow, *supra* note 222, at 71-72; Valente, *supra* note 300, at 191.

346. *See* Pagelow, *supra* note 222, at 73.

347. *See id.* at 72.

348. *See* Becker, *supra* note 190, at 17; Czapanskiy, *supra* note 86, at

custody.³⁴⁹ This belief that the father's violence is irrelevant in custody cases persists in the face of compelling evidence that children who witness the abuse³⁵⁰ exhibit many behavioral and psychological problems,³⁵¹ and that spouse

249, 252, 254-56 & n.19; Mahoney, *supra* note 192, at 11-12; Meier, *supra* note 299, at 1308, 1310; Pagelow, *supra* note 222, at 73; Lynn Hecht Schafran, *There's No Accounting for Judges*, 58 ALB. L. REV. 1063, 1063-67 (1995). The report of the Florida Gender Bias Commission provides extreme examples of judicial attitudes toward battered women:

Upon learning that a husband had poured lighter fluid on his wife and set her afire, one Palm Beach County judge, in open court, sang, "You light up my wife" to the tune of the song, "You Light Up my Life." When the judge in a recent first-degree murder case learned that the defendant had tried to kill his wife, the judge asked, in open court, "Is that a crime here in Dade County?"

Florida Gender Bias Report, *supra* note 43, at 863 (footnotes omitted).

349. See Becker, *supra* note 190, at 17, 23; Cahn, *supra* note 336, at 1073; Czapanskiy, *supra* note 86, at 257 & n.30; Meier, *supra* note 299, at 1308; Schafran, *supra* note 92, at 192; Schneider, *supra* note 323, at 555; see also Katz v. Katz, 467 N.Y.S.2d 223 (N.Y. App. Div. 1983). Minow relates one case in which the judge commented on the wife's allegations of spouse abuse, "He may have abused her, but that doesn't necessarily make him a bad father." Minow, *supra* note 212, at 1673. Cases in which judges award custody of children to fathers who have murdered the children's mothers provide an extreme example of this judicial attitude. See Keenan, *supra* note 197, at 414-17.

350. Jaffe explains that children may "witness" the abuse of their mothers in a variety of ways; they may observe the violence directly by watching their father threaten or hit their mother, they may overhear the violence from another part of the house, or they may observe the results of the violence without hearing or seeing any aggressive act. See JAFFE ET AL., *supra* note 210, at 17. Studies indicate that at least 3.3 million children per year are exposed to parental violence, and that children are present in 41% to 80% of incidents of wife assault. See *id.* at 20.

351. SEE JAFFE ET AL., *supra* note 210, at 26 (explaining that the particular harms suffered by a child who witnesses the abuse of its mother depends upon the child's age, sex, stage of development, role within the family, and other factors). An infant's need for attachment, for example, may go unfulfilled because of the mother's stress from being abused. See *id.* Infants who witness abuse also have health problems, including low weight, poor eating patterns, sleeping difficulties, and lack of responsiveness to adults. See *id.* at 35, 40. Toddlers frequently have mood-related disorders, such as anxiousness, crying, and sadness. See *id.* at 35. They may show signs of terror, such as yelling, irritable behavior, hiding, shaking, and stuttering, and many regress to earlier developmental stages. See *id.* at 40. Latency-age children model their father's behavior and learn violence as an

abusers frequently physically and sexually abuse their children.³⁵² More perversely, judges who do believe that

appropriate way to resolve conflict. *See id.* at 26. When they come to shelters, boys frequently act out, becoming disobedient, defiant, and destructive. *See id.* at 35. Latency age girls may learn that victimization is inevitable. *See id.* at 26. Young girls who come to shelters appear withdrawn, clingy, and dependent. *See id.* at 35. Practicing at school what they have learned at home may undermine children's social adjustment and academic performance. *See id.* at 26. Many witnessing children live with the shame of the hidden violence in their homes, and their experience undermines their sense of self-esteem and confidence in the future. *See id.* Their father's domination isolates them from peers and extracurricular activities, hindering their social development. *See id.* at 26, 27, 49. Children frequently blame themselves for the violence, a tremendous burden for a child to carry. *See id.* at 27. Children remain confused, anxious, and fearful while they await the next violent outburst. *See id.* at 27. As a result, they may spend most of their time at school distracted and inattentive to academic tasks. *See id.* at 27, 50. Their stress also compromises their physical and psychological health. *See id.* at 34-35. Many complain of headaches, tight stomachs, and bite their fingernails or pull their hair, while some become suicidal. *See id.* at 49. Having witnessed violence against their mothers for years, adolescent children may begin to participate or accept violence in their own relationships. *See id.* at 27. Some adolescents escape the violence by running away from home. *See id.* Some adolescents act out their anger and frustration by committing violent crimes, including assaults on their mothers or siblings. *See id.* at 30, 33. Others, particularly girls, attempt to shoulder the responsibility of keeping the family peace and protecting their siblings and mothers. *See id.* at 30-31. Thus, witnessing the abuse of their mothers profoundly affects many children; *see also* Cahn, *supra* note 336, at 1055-59; Sandra A. Graham-Bermann & Alytia A. Levendosky, *Traumatic Stress Symptoms in Children of Battered Women*, 13 J. INTERPERSONAL VIOLENCE 111 (1998); Michael Hershorn & Alan Rosenbaum, *Children of Marital Violence: A Closer Look at the Unintended Victims*, 55 AM. J. ORTHOPSYCHIATRY 260 (1985); George W. Holden & Kathy L. Ritchie, *Linking Extreme Marital Discord, Child Rearing, and Child Behavior Problems: Evidence from Battered Women*, 62 CHILD DEV. 311 (1991); Johnson, *supra* note 336, at 274-75; Peter Lehmann, *The Development of Posttraumatic Stress Disorder (PTSD) in a Sample of Child Witnesses to Mother Assault*, 12 J. FAM. VIOLENCE 241 (1997); Pagelow, *supra* note 222, at 77; Saunders, *supra* note 327, at 52-53; Alan J. Tomkins et al., *The Plight of Children Who Witness Woman Battering: Psychological Knowledge and Policy Implications*, 18 L. & PSYCHOL. REV. 137 (1994).

352. Approximately one-half of the men who batter their female partners also abuse their children. *See* Saunders, *supra* note 327, at 51-52; *see also* Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 158, 165-66 (Kersti Yllo & Michele Bograd eds. 1988); Cahn, *supra* note 336, at 1055-58; Meier, *supra* note 299, at 1308; Roberts, *supra* note 111, at 111-12 & nn.84-86; Schneider, *supra* note 323, at 551 n.128, 554.

spouse abuse harms children sometimes blame the mother for her failure to remove and protect the children,³⁵³ or they perceive her failure to leave and avoid the violence to herself as a pathology³⁵⁴ that makes her an unsuitable child custodian.³⁵⁵ Conversely, if she does attempt to protect herself and the children by fleeing with them to a shelter, the judge may find her living arrangements inferior to those of her husband and award the husband custody.³⁵⁶ If she tries to protect the children by calling the father's abuse of them to the attention of the court, the judge frequently

The long-term effects of physical and sexual abuse of children include depression, susceptibility to suicide, anxiety disorders, eating disorders, sexual dysfunction, dissociative disorders, personality disorders, posttraumatic stress disorder (PTSD), substance abuse, and adult psychiatric disorders including psychosis. See John Read, *Child Abuse and Psychosis: A Literature Review and Implications for Professional Practice*, 28 PROFESSIONAL PSYCHOL. 448 (1997); Saunders, *supra* note 327, at 51-52 (stating that approximately half the men who batter their female partners also abuse their children).

353. See Meier, *supra* note 299, at 1309; Schneider, *supra* note 323, at 551-53 & n.135. Perhaps judicial attitudes should not surprise, since mother blaming pervades our society. See, e.g., NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978); DOWD, *supra* note 21, at xiv-xv, 3-15; P. Caplan & I. Hall-McCorquodale, *Mother Blaming in Major Clinical Journals*, 55 AM. J. ORTHOPSYCHIATRY 345 (1985); Bernardine Dohrn, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, 2 U. CHI. L. SCH. ROUNDTABLE 1 (1995); M. Laurie Leitch, *The Politics of Compromise: A Feminist Perspective on Mediation*, 14/15 MEDIATION Q. 163, 167 (1986-87). Martha Fineman argues that single mothers especially are stigmatized and scorned as deviant. See Fineman, *supra* note 180, at 2182, 2190-93, 2206-08.

354. See Mahoney, *supra* note 192, at 37-39; Meier, *supra* note 299, at 1302-03; Schneider, *supra* note 323, at 556. In contrast, most experts understand that a woman's decision to remain in an abusive relationship results from her rational assessment of a variety of factors as well as the psychological correlates of abuse. See generally Choice & Lamke, *supra* note 320; Hamby & Gray-Little, *supra* note 320; A. J. Z. Henderson et al., *He Loves Me; He Loves Me Not: Attachment and Separation Resolution of Abused Women*, 12 J. FAM. VIOLENCE 169, 170 (1997).

355. See Czapanskiy, *supra* note 86, at 257; Meier, *supra* note 299, at 1306.

356. See Mahoney, *supra* note 192, at 44. One judge claimed that a battered woman's extensive contacts with a protective shelter showed that "self-interest and excessive liberalism" characterized her environment. Saunders, *supra* note 327, at 56 (citing L. Fredericks, *Minnesota Supreme Court Creates Primary Caretaker Presumption in Child Custody Disputes*, 7 WOMEN'S ADVOC. 1, 2 (1986)).

believes she has fabricated the abuse to gain an advantage in divorce negotiations.³⁵⁷ Her allegations can also indicate her "unfriendliness" toward the father or her unfitness as a parent, ultimately resulting in her loss of custody to the abuser.³⁵⁸

Battered women's reactions to abuse can severely compromise their credibility before the court and call into question their ability to parent. Some abused women exhibit symptoms of post-traumatic stress disorder (PTSD),³⁵⁹ including: (1) hyperarousal, a consistent alert for danger that may cause excessive irritability and explosive aggression, (2) intrusion, a reexperience of the original violence through flashback and nightmare, and (3) constriction, a dissociation, trance, or numbness that protects against experiencing a terrifying memory.³⁶⁰ A battered wife suffering from PTSD, or from various aspects of PTSD, may repress memories of violent events, relate her story in convoluted fragments, exhibit inappropriate affect while testifying about abusive incidents,³⁶¹ minimize the magnitude and impact of the abuse,³⁶² overreact to a batterer's seemingly insignificant behavior or remark, and testify inconsistently with other evidence such as medical records.³⁶³ Unless a judge has unusual sensitivity to the effects of domestic violence, she or he may perceive a battered wife with PTSD as incredible and unable to parent.

Although a battered mother's symptoms may not warrant a diagnosis of PTSD, her reactions to the abuse may still cause her to lose custody. Today courts

357. See Becker, *supra* note 190, at 17.

358. See *id.* at 24-26; see also *Family Violence in Child Custody Statutes*, *supra* note 322, at 201-02 (arguing the inappropriateness of friendly parent provisions in domestic violence cases).

359. See Meier, *supra* note 299, at 1312-13; Concepcion Silva et al., *Symptoms of Post-Traumatic Stress Disorder in Abused Women in a Primary Care Setting*, 6 J. WOMEN'S HEALTH 543 (1997). Symptoms of PTSD typically result from exposure to extreme trauma, personally or as a witness, or from learning of an unexpected threat to, injury to, or death of someone close. See Silva et al., *supra*, at 543. Prolonged exposure to a stressor, regardless of its nature, also can produce symptoms of PTSD. See *id.* at 544.

360. See Meier, *supra* note 299, at 1312; Silva et al., *supra* note 359.

361. See Saunders, *supra* note 327, at 54.

362. See Hamby & Gray-Little, *supra* note 320, at 339.

363. See Meier, *supra* note 299, at 1313.

increasingly rely upon evaluations by mental health professionals in deciding custody cases.³⁶⁴ Yet, many mental health professionals know little about domestic violence.³⁶⁵ Abused wives commonly perform poorly on psychological tests, encouraging ignorant mental health professionals to evaluate them negatively.³⁶⁶ The abuse she has experienced may have induced her to abuse the children.³⁶⁷ Although the battered mother's abuse of the children tends to cease after separation from the batterer,³⁶⁸ inexperienced mental health professionals may overlook this tendency. The batterer, however, is far more likely to abuse the children than his spouse,³⁶⁹ and his abuse is commonly more frequent and severe.³⁷⁰ Yet batterers tend to perform better than their victims on psychological tests³⁷¹ and their skill at manipulation may result in a favorable psychological evaluation.³⁷² The abuser's violent treatment of his wife

364. See *supra* notes 210-13 and accompanying text; see also Saunders, *supra* note 327, at 54.

365. See JAFFE ET AL., *supra* note 210, at 108. To support their contention that evaluating mental health professionals may know little about domestic violence, Jaffe et al. call attention to a 1986 book about custody assessments that contained nothing about domestic violence except the warning to exercise caution about women's exaggerated reports of violence. See *id.* at 108 (citing R. PARRY ET AL., CUSTODY DISPUTES: EVALUATION AND INTERVENTION (1986)); see also Saunders, *supra* note 327, at 54 (noting that therapists fall prey to the same misunderstandings of battered women's behavior as do judges).

366. Psychiatrists frequently diagnose battered women as paranoid or conclude that battered women suffer from a variety of character disorders. See Meier, *supra* note 299, at 1301; see also JAFFE ET AL., *supra* note 210, at 71 (noting that mental health professionals have misdiagnosed battered women as schizophrenic or paranoid); Saunders, *supra* note 327, at 54 (warning that battered women's poor performance psychological tests can lead to misdiagnosis).

367. See Saunders, *supra* note 327, at 52.

368. See Pagelow, *supra* note 222, at 77.

369. Abusive husbands are three times more likely to abuse their children than are their abused wives. See Howard A. Davidson, *Child Abuse and Domestic Violence: Legal Connections and Controversies*, 29 FAM. L.Q. 357, 357 (1995); Pagelow, *supra* note 222, at 77.

370. See Saunders, *supra* note 327, at 52.

371. See Meier, *supra* note 299, at 1302 n.19 (citing Evan Stark, *Framing and Reframing Battered Women*, in DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 287 (Eva Buzawa ed., 1993)); see also Saunders, *supra* note 327, at 54 (advising that batterers frequently appear to function well, while their partners give the inaccurate appearance of pathology).

372. See JAFFE ET AL., *supra* note 210, at 107-08; Mahoney, *supra*

ultimately enables him to present his beaten wife to the court as unstable and unable to parent.³⁷³ Although expert testimony can sometimes curtail judicial ignorance, the abused wife may lack the financial resources to hire an expert.

Although preferences for joint custody and friendly parent provisions disadvantage all mothers, they severely disadvantage abused mothers.³⁷⁴ If an abused mother attempts to protect the children and herself by requesting sole custody in a state favoring joint custody, the court, or the evaluating mental health professionals,³⁷⁵ may perceive her as an unfriendly parent. If she flees with the children, she interferes with the batterer's access to them, becoming an unfriendly parent. On the other hand, if she flees and leaves the children behind she risks claims of abandonment,³⁷⁶ instability,³⁷⁷ and insensitivity to her children's needs. If she engages in any of these self-protective behaviors she severely compromises her custody case.

The foregoing discussion illustrates the extreme disadvantage abused wives have in custody disputes and justifies her fear of losing custody. This fear can interfere

note 192, at 47-48.

373. The Commission on Gender Bias for the State of Georgia reported:

A frequent complaint to the Commission was the batterer's tactic in divorce proceedings of "going on the offensive" and attempting to demonstrate that the victim is unstable, is not self-sufficient, or is unable to care for their children. Judges who do not understand the syndrome often fulfill the batterer's threat and the victim's worst nightmare by awarding custody to the father, interpreting the victim's erratic behavior as neurotic.

Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System, 8 GA. ST. L. REV. 539, 589 (1992); see also Keenan, *supra* note 197, at 424.

374. See Keenan, *supra* note 197, at 424-25.

375. In custody disputes courts commonly rely upon custody recommendations of social workers or psychologists. See Fineman, *supra* note 187, at 740-44. Additionally, social workers are generally suspicious of those who request sole custody. See *id.* at 766.

376. See Mahoney, *supra* note 192, at 46; Meier, *supra* note 299, at 1310; see also Ostrander v. Ostrander, 541 N.Y.S.2d 630 (N.Y. App. Div. 1989) (awarding custody to father when the battered mother left the children with the father).

377. See Mahoney, *supra* note 192, at 46; Meier, *supra* note 299, at 1310; Czapanskiy, *supra* note 86, at 257; Schneider, *supra* note 323, at 557.

significantly with her pursuit of a sensible custody/visitation plan and/or a fair financial settlement.

IV. LAWYER REPRESENTATION AND JUDICIAL OVERSIGHT

Many wives do not seek or cannot find legal representation.³⁷⁸ Moreover, in the legal context just described, a wife's lawyer seems more like Don Quixote flailing at windmills than Teddy Roosevelt leading the charge up San Juan Hill. It is said that attorneys negotiate divorce agreements in the "shadow of the law,"³⁷⁹ implying that formal law protects wives in settlement negotiations.³⁸⁰ As noted, however, law's indeterminacy, its individualistic ideology, and its failure to comprehend women's worlds make it difficult for even the most capable lawyers to obtain equitable results for wives.

Studies suggest that divorce lawyers frequently encourage their clients to settle with little or no reference to legal principles.³⁸¹ Practical realities suggest more obstacles.

378. See *supra* notes 89-99 and accompanying text.

379. See Mnookin & Kornhauser, *supra* note 196; see also Melvin A. Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976).

380. See Mnookin & Kornhauser, *supra* note 196, at 968-70.

381. See William L. F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1497 (1992); Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663, 1682-84 (1989). See generally SARAT & FELSTINER, *supra* note 128; Austin Sarat & William L.F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 L. & SOC'Y REV. 737 (1988); Austin Sarat & William L. F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 L. & SOC'Y REV. 93 (1986). In his study of divorced spouses Jacob found that many clients do not frame their cases legalistically and, with the exception of child support guidelines, do not believe the law had much effect on their settlements. See Herbert Jacob, *The Elusive Shadow of the Law*, 26 L. & SOC'Y REV. 565, 576-78 (1992). Their lawyers frequently failed to provide them with helpful legal advice, rather, many clients negotiated their own agreements, using their lawyers more as clerks than as legal professionals. See *id.* at 579-80, 584-85. These studies suggest a far more limited role for law in divorce negotiations than that suggested by Mnookin and Kornhauser. Moreover these studies are consistent with others that have shown that lawyers in contexts other than divorce frequently settle with little reference to law. See Menkel-Meadow, *supra* note 10, at 2675.

Lawyers themselves are steeped in the masculine ideologies of law and the market.³⁸² They may even exhibit overt gender bias.³⁸³ Representation by counsel may contribute to, rather than intercept, women's disadvantages.³⁸⁴ Apart from their troublesome attitudes, many lawyers are incompetent,³⁸⁵ or incompetently represent some clients.³⁸⁶ Some attorneys take divorce cases only when more desirable cases are unavailable.³⁸⁷ Other lawyers, many of

382. Winner relates a subtle, yet typical, form of exclusion:

One woman recalled the divorce proceeding, and a crucial deposition session in which her lawyer was supposed to question her husband about the contents of the marital estate: 'My lawyer, my husband, and his attorney were joking together, talking about the ball game before the deposition, leaving me out of their talks completely and then interrupting me whenever I tried to raise an important question during the deposition.'

WINNER, *supra* note 87, at 91. For a particularly graphic example of gender bias on the part of the wife's female lawyer, see Bryan, *supra* note 88, at 177-88.

383. See CHESLER, *supra* note 45, at 198-208 (describing lawyers' gender bias against women in custody disputes).

384. See Marcus, *supra* note 286, at 462-64, 467 n.342 (noting that divorce settlements negotiated by lawyers reflect the same gendered decisionmaking reflected in judicial decisions). In Terry Arendell's study of sixty divorced mothers, only seven of the mothers failed to complain vehemently about their lawyers. See ARENDELL, *supra* note 14, at 13. Of those seven, three of the mothers had proceeded *pro se*, three had reached an agreement with their husbands before hiring lawyers, and one had entered law school and obtained her divorce with the help of one of her professors. See *id.* For a scathing indictment of lawyers' representation of wives during divorce, see WINNER, *supra* note 87.

385. See WINNER, *supra* note 87, at 18.

386. Sarat and Felstiner tell the story of Kathy whom they label "The Unsupported Wife." Kathy was represented by Wendy, a self-styled feminist lawyer. Wendy insisted that Kathy required spousal maintenance to survive financially. Wendy also realized that Kathy never had been able to stand up to her husband Nick. Indeed, whenever Kathy thought about confronting Nick, she cringed. Nevertheless, Wendy sent Kathy to negotiate with Nick alone, and Kathy predictably failed to secure Nick's agreement to pay spousal maintenance. See SARAT & FELSTINER, *supra* note 128, at 63-83. In his study of divorced spouses Jacob found that many clients received very little legal advice from their attorneys and that many others used their attorneys only to prepare and process the agreements the clients independently had reached with their spouses. See Jacob, *supra* note 381, at 579-81.

387. Sarat and Felstiner explain that client emotionalism and dissatisfaction, low professional prestige, lack of financial rewards, and unpleasantness of tasks, discourage lawyers from enthusiastic

them unimpressive solo practitioners, "specialize" in mass-production, by-the-numbers divorces³⁸⁸ because a steady stream of divorce clients pays the bills. Only within the past two decades have high quality law firms specializing in divorce become a common feature of the legal landscape.³⁸⁹ For the most part, these firms represent just a few wealthy clients, many of them husbands.³⁹⁰

As noted, many lawyers are reluctant to represent wives because of their frequently accurate perception that wives may be unable to pay attorney fees.³⁹¹ Inadequate financial resources may also lead attorneys to forego needed discovery³⁹² and to invest inadequate time in case preparation.³⁹³ Practice pressures may cause lawyers to neglect their clients' cases.³⁹⁴ Lawyers may then negotiate

representation of divorce clients. See SARAT & FELSTINER, *supra* note 128, at 3-4; see also Bryan, *supra* note 88, at 177-88 (relating the story of a divorce lawyer's incompetent representation of the wife).

388. See PHILLIPS, *supra* note 101, at 58.

389. A variation on this theme is the high status law firm creates a family law division in response to client demand.

390. A wealthy lawyer friend who lives in a town of about 75,000 recently filed for divorce. Before choosing his lawyer, he interviewed every law firm in his area known to specialize in divorce. During the interviews he provided enough facts about his finances and the marriage to assure that none of these firms could represent his wife without a conflict of interest. He is not the only wealthy man I have known to employ this tactic.

391. See *supra* notes 79-91 and accompanying text.

392. In many cases where the wife attempts to vacate a prior divorce judgment that incorporated a property settlement agreement, the lack of discovery by the wife's lawyer is apparent. See *In re Marriage of Steadman*, 670 N.E.2d 1146 (Ill. App. Ct. 1996); *In re Broday*, 628 N.E.2d 790 (Ill. App. Ct. 1993); *In re Marriage of Foster*, 451 N.E.2d 915 (Ill. App. Ct. 1983); see also Melli et al., *supra* note 15, at 1146-47. One must assume either that all of these lawyers are incompetent, and/or that their clients lacked the resources with which to pursue discovery.

393. See Bryan, *supra* note 88, at 177-88 (relating the story of a lawyer's failure to conduct discovery, leading to an inequitable settlement).

394. Attorney neglect of divorce cases seems rampant. See WINNER, *supra* note 87, at 71-92. Several commentators note that many divorce cases are settled in court hallways just minutes before the final hearing. See generally Melli et al., *supra* note 15, at 1143. One might think that this settlement behavior equally disadvantages husbands and wives. On closer inspection this seems unlikely. Generally, husbands have in their possession the income and property that the wife wants transferred to her. Moreover, he is in a much stronger position to resist that transfer than she is to force it. She needs what he

with inadequate information³⁹⁵ and may encourage their women clients to accept poor agreements,³⁹⁶ sometimes in the hallways just before trial.³⁹⁷ Add to this calculus the fact that attorneys, for practical, emotional, and financial reasons, would often rather settle than try divorce cases,³⁹⁸ and that the wife generally is less able than the husband to resist an attorney's pressure to settle.³⁹⁹ Indeterminate law helps the wife's lawyer persuade her to accept his advice.⁴⁰⁰

has and he, as yet, is under no compunction to give her what she needs. These factors combine with her financial desperation, her attorney's inferior preparation, indeterminate law, prevailing ideologies, and her fear of the impending open conflict to disadvantage her more than her husband.

395. See Melli et al., *supra* note 15, at 1146-47. Appellate opinions addressing petitions to vacate or set-aside the property settlement provisions in a final divorce decree provide numerous examples of the wife's divorce attorney failing to conduct discovery. See *In re Marriage of Beck*, 404 N.E.2d 972, 974 (Ill. App. Ct. 1980); *Beattie v. Beattie*, 368 N.E.2d 178, 179-80 (Ill. App. Ct. 1977). In one study of 349 Wisconsin divorce cases only 90 files contained Financial Disclosure Sheets from both parties whereas 126 files contained little or no financial information. See Melli et al., *supra* note 15, at 1146-47.

396. Winner notes that divorce lawyers frequently urge their women clients to accept agreements the women do not want, explaining that the agreements are "for [the client's] own good." WINNER, *supra* note 87, at 69, 91; see also Melli et al., *supra* note 15, at 1158-59.

397. See *Beattie*, 368 N.E.2d at 179-80.

398. Sarat and Felstiner's study confirms how much divorce lawyers prefer settlement. See SARAT & FELSTINER, *supra* note 128, at 108-21; see also *In re Marriage of Flynn*, 597 N.E.2d 709, 173 (Ill. App. Ct. 1992).

399. In their study of divorce cases Erlanger et al. found that settlement terms reflected the parties' stamina and vulnerability to the pressures of prolonged negotiations. See Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 L. & SOC'Y REV. 585, 592 (1987). Financial pressures sometimes persuaded clients to accept settlement proposals their lawyers considered unfair. See *id.* Many seasoned family law attorneys attempt to schedule temporary support hearings as early in the divorce process as possible to avoid these pressures. Yet crowded dockets, evasion tactics by opposing lawyers, and judicial reluctance to award temporary support frequently foil their attempts.

400. See WINNER, *supra* note 87, at 91. Sarat and Felstiner studied interactions between divorce lawyers and their clients. Their work provides numerous examples of lawyers using evasive predictions of what a court will do in order to manipulate clients into accepting particular settlements. See SARAT & FELSTINER, *supra* note 128, at 124-26. Moreover, lawyers frequently invoke vague "standards" or "rules of thumb" in order to encourage their clients to accept particular settlement provisions. See *id.* at 121-24; Melli et al., *supra* note 15, at

Finally, if the wife's lawyer expects to collect attorney fees from the husband, the lawyer may compromise the wife's position in order to ingratiate herself with the husband.⁴⁰¹ Put simply, the legal culture of divorce frequently permits and encourages the wife's attorney to compromise the wife's interests during negotiations, and to encourage the wife to accept a poor deal.⁴⁰² Tellingly, one author notes that judges seem more inclined to divide marital property equally than litigants who settle their cases.⁴⁰³

Judicial oversight may, but usually does not, provide relief from unfair settlement agreements. At the final hearing most jurisdictions require the judge to review settlement agreements for unfairness or unconscionability.⁴⁰⁴ Currently, however, for a myriad of reasons,⁴⁰⁵ judges review only cursorily the provisions of divorce settlements.⁴⁰⁶ What review does occur seems

1143-44. "Law" for the client is whatever the lawyer says it is. The client cannot challenge the lawyer's assertions of knowledge particularly because determinate legal standards do not exist.

401. See WINNER, *supra* note 87, at 90-91.

402. Unsurprisingly many wives complain of having been coerced by their attorneys into bad settlements or of having been abandoned by their attorneys during divorce negotiations.

403. See Garrison, *supra* note 14, at 685-86.

404. See Sally Burnett Sharp, *Semantics as Jurisprudence: The Elevation of Form Over Substance in the Treatment of Separation Agreements in North Carolina*, 69 N.C. L. REV. 319, 322 & n.14 (1991).

405. For reasons such as judicial frustration with overcrowded dockets, judicial deference to family privacy, and judicial distaste for divorce cases, see *Florida Gender Bias Report*, *supra* note 43, at 811-12, 830; *Missouri Gender Bias Report*, *supra* note 43, at 537-39 (noting judicial dislike of family law cases), and a pervasive preference for private settlement encourage judges to accept without serious question unfair settlement provisions.

406. See, e.g., Mnookin & Kornhauser, *supra* note 196, at 951 & n.2, 955; Mnookin, *supra* note 1, at 365. Judges typically inquire only whether the divorcing couple considers the agreement fair and/or whether the agreement accurately reflects their understanding. In the words of one trial judge:

If they know what they're doing, even if it is out of line, then it is not my job to change their decision. I'll inquire to make sure they know what they are doing. I have to let them know what their options are. But I won't usually change it. I don't know if I have ever changed an amount set by a couple.

Melli et al., *supra* note 15, at 1145. Melli et al. found only one instance of judicial intervention in 349 cases they studied. The judge intervened in that case because the state child support agency objected to the settlement's terms regarding child support. See *id.* See also Sally

directed more to whether the parties voluntarily agreed to the settlement than to the settlement's substance.⁴⁰⁷ As one lawyer explained to his divorce client:

An agreement is totally creative between the two of you. The two of you can agree to anything you want to, as long as it's not illegal. The judge is going to say fine, and it can be as lopsided as you want to make it. The judge will say fine if you both think it's fair and both of you agree to it.⁴⁰⁸

Judicial oversight, consequently, fails to intercept and rectify unfair divorce agreements.

V. PETITIONS TO VACATE OR SET-ASIDE UNFAIR AGREEMENTS

Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.⁴⁰⁹

When a judge fails to intercept an unfair agreement at the time of divorce, a wife may return to court later with a petition to set aside or vacate the agreement.⁴¹⁰ Many wives lack the financial and emotional resources needed to challenge unfair settlement agreements.⁴¹¹ Wives who do

Burnett Sharp, *Modification of Agreement-Based Custody Decrees: Unitary or Dual Standard?*, 68 VA. L. REV. 1263, 1264 (1982) (describing the reluctance of judges to alter custody and visitation agreements). Coached by their lawyers, parties mechanically testify that they consider the agreement fair and that the agreement reflects their understanding.

407. See Melli et al., *supra* note 15, at 1146.

408. See SARAT & FELSTINER, *supra* note 128, at 121-22.

409. See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

410. See *infra* notes 417-29 and accompanying text.

411. An attorney responding to the Florida Gender Bias Commission painted this picture of the wife at the end of the divorce proceeding:

[I]t's just a simple reality. You run into situations in the representations specifically of women who generally don't have the purse strings and by the end of divorce they have run out of money, they have run out of credit worthiness, they have run out of every possible relative or friend [from whom] they could borrow money in pursuing the litigation itself, . . .

move to have agreements set aside or vacated frequently confront insensitive judges and a second layer of masculine law. The contract doctrines of coercion, duress, misrepresentation, and unconscionability, and the particular spin that judges place on these doctrines in family law frequently confirms rather than corrects unfair results.

Because of the disadvantage of wives in settlement negotiations, courts should listen sympathetically to women's complaints of duress or coercion and should look with suspicion upon agreements with seemingly unfair provisions. Many courts, in fact, reason that freedom of contract should be restricted in divorce cases for reasons of public policy. The state, they say, should guard against unconscionability in the substance of divorce agreements⁴¹² and against fraud, duress, and undue influence in the making⁴¹³ of the agreements.

Despite this lofty rhetoric, courts seem highly reluctant to set aside divorce settlement agreements.⁴¹⁴ Some of the reluctance⁴¹⁵ can be explained by the failure of masculine legal standards to capture the experience of women.⁴¹⁶

Florida Gender Bias Report, *supra* note 43, at 810-11.

412. See, e.g., *McIntosh v. McIntosh*, 328 S.E.2d 600, 602 (N.C. App. 1985) (citing cases where courts have thrown a "cloak of protection" around agreements negotiated between husband and wife to ensure their fairness).

413. See Sharp, *supra* note 404, at 327 n.42.

414. See *id.* at 329 n.50; see also Lou McPhail, Comment, *Divorce—Alimony, Allowances, and Disposition of Property—Abuse of Discretion—The Unconscionable Stipulated Divorce Agreement and Rule 60(b)(vi): What About the Children?*, 72 N. DAK. L. REV. 1099, 1106-07 (1996) (commenting on *Crawford v. Crawford*, 524 N.W.2d 833 (N.D. 1994), where the North Dakota Supreme Court found a stipulated divorce agreement unconscionable). Judicial frustration with overcrowded dockets, judicial deference to family privacy, judicial distaste for divorce cases, and a pervasive preference for private settlement encourage judges to refuse to vacate unfair agreements.

415. Efficiency concerns, reflected in a policy favoring divorce settlements and gender bias also make important contributions.

416. See PATEMAN, *supra* note 2 for a discussion of the patriarchal nature of contract theory. Many scholars note that legal norms frequently fail to anticipate the worlds of women and other subordinated persons. See, e.g., MACKINNON, *supra* note 211, at 238; OKIN, *supra* note 19, at 7; Abrams, *supra* note 74, at 318-20 n.55; Gilkerson, *supra* note 197, at 873-75; Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1642 (1991).

The law of the State of Illinois provides an example of how courts address petitions to vacate property settlements. The State has a policy that favors settlement of divorce disputes and the Illinois courts presume the validity of divorce settlements.⁴¹⁷ An Illinois statute declares that a court may not set aside or vacate a divorce settlement unless it finds the agreement unconscionable.⁴¹⁸ In making this determination, the court is to employ a concept of unconscionability taken from Illinois commercial law.⁴¹⁹ Unconscionability requires an absence of meaningful choice on the part of one party together with contract terms unreasonably favorable to the other party.⁴²⁰ An unconscionable agreement must be extremely one-sided or oppressive, an agreement "which no man, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other."⁴²¹

417. See, e.g., *In re Marriage of Gorman*, 671 N.E.2d 819, 825 (Ill. App. Ct. 1996); *In re Marriage of Gidlund*, 614 N.E.2d 315, 317 (Ill. App. Ct. 1993); *In re Marriage of Riedy*, 474 N.E.2d 28, 30 (Ill. App. Ct. 1985); *Bickson v. Bickson*, 183 N.E.2d 16 (Ill. App. Ct. 1962).

418. This standard is set forth in the Illinois Marriage and Dissolution of Marriage Act which provides:

The terms of the separation agreement, except those providing for the support, custody and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable.

40 ILL. COMP. STAT. ANN. 502(b) (West 1992). Other states allow spouses to challenge separation agreements incorporated into final judgments by invoking civil procedure rules pertaining to relief from final judgments. They then commonly employ contract principles in determining whether the judgment should be vacated. See, e.g., *McPhail*, *supra* note 414, at 1105-06 (commenting on *Galloway v. Galloway*, 281 N.W.2d 804 (N.D. 1979)).

419. See, e.g., *In re Marriage of Kloster*, 469 N.E.2d 381, 385 (Ill. App. Ct. 1984); *In re Marriage of Foster*, 451 N.E.2d 915, 918 (Ill. App. Ct. 1983). Occasionally an appellate court will note that unconscionability also protects against "overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other." *In re Marriage of Carlson*, 428 N.E.2d 1005, 1010 (Ill. App. Ct. 1981) (citations omitted). In the vast majority of cases, however, courts omit any reference to this obligation.

420. See, e.g., *In re Gorman*, 671 N.E.2d at 826; *In re Marriage of Broday*, 628 N.E.2d 790 (Ill. App. Ct. 1993); *In re Carlson*, 428 N.E.2d at 1010.

421. *In re Marriage of Gurin*, 571 N.E.2d 857, 864 (Ill. App. Ct. 1991) (quoting *In re Carlson*, 428 N.E.2d at 1010); See, e.g., *In re Kloster*, 469

The courts use a two-part test to determine unconscionability. They inquire into: (1) the conditions under which the agreement was made, and (2) the economic circumstances of the parties produced by the agreement.⁴²² Claims of duress, coercion,⁴²³ and fraud⁴²⁴ are examined under the first prong of the unconscionability test. These claims must be established by clear and convincing evidence.⁴²⁵ The party challenging the agreement must establish an absence of meaningful choice.⁴²⁶

Of course, this standard is difficult to satisfy. It reflects a market mentality that presumes equality, autonomy, and self-interest as governing norms. Wives' challenges to unfair settlement agreements predictably fail.⁴²⁷

N.E.2d at 385; *In re Foster*, 451 N.E.2d at 919; *In re Carlson*, 428 N.E.2d at 1010.

422. *In re Gorman*, 671 N.E.2d at 826; *In re Foster*, 451 N.E.2d at 919.

423. Illinois courts define duress as:

[T]he imposition, oppression, undue influence or the taking of undue advantage of the stress of another whereby one is deprived of the exercise of his free will. The person asserting duress has the burden of proving, by clear and convincing evidence, that he was bereft of the quality of mind essential to the making of the contract.

In re Marriage of Hamm-Smith, 633 N.E.2d 225, 230 (Ill. App. Ct. 1994) (citations omitted).

424. Illinois courts define fraud as follows:

For a misrepresentation to constitute fraud, it must consist of a material false statement which is known to be false by the party making it, made to induce the other party to act in reliance on the truth of the statement, and actually acted upon by that other party.

In re Marriage of Held, 392 N.E.2d 169, 172-73 (Ill. App. Ct. 1979) (citation omitted).

425. See *In re Marriage of Goldberg*, 668 N.E.2d 1104, 1107 (Ill. App. Ct. 1996) (explaining that a claim of fraud requires clear and convincing evidence that the defendant intentionally misstated or concealed a material fact that he had a duty to disclose and upon which the plaintiff detrimentally relied); *In re Broday*, 628 N.E.2d 790; *In re Gorman*, 671 N.E.2d at 826 ("[T]he person asserting coercion bears the burden of proving it by clear and convincing evidence."); *In re Carlson*, 428 N.E.2d 1005; *Beattie v. Beattie*, 368 N.E.2d 178, 182 (Ill. App. Ct. 1977) (stating that party seeking to set aside a divorce settlement must prove by "clear and convincing evidence that the agreement was entered as the result of coercion, fraud or duress, or is contrary to public policy or morals.").

426. See *In re Carlson*, 428 N.E.2d at 1010.

427. The wife frequently combines two or more claims such as misrepresentation and duress under the first prong of the

To illustrate how the application of Illinois' unconscionability doctrine perverts the wife's experiences and reinterprets them through a lens of masculine law, I analyze one representative case in detail and follow with shorter depictions of other cases. Of course only wives with substantial financial and emotional resources can afford to petition a trial court to set aside or vacate a property settlement, and many questionable agreements doubtlessly go unchallenged. Moreover, the appellate decisions I have reviewed strongly suggest that trial courts generally deny these petitions.⁴²⁸ Consequently, we know only of cases in which wives possess sufficient financial and emotional resources not only to petition the trial court but also to appeal,⁴²⁹ suggesting that the situation is even worse than the appellate cases reveal.

I turn now to a representative case.⁴³⁰ The following facts come from the appellate opinion, from interviews with the wife and her second attorney, and from the transcript of the hearing on the wife's Motion to Vacate the settlement agreement. They exemplify many of the concerns raised at the beginning of this paper.

Doris married Virgil in 1956 in Walterloo, Illinois.⁴³¹

unconscionability standard. In addressing these claims courts frequently fracture the factual context into many small pieces which taken by themselves lose their compelling nature and distort the wife's reality. In some cases, the wife fails even to allege a specific claim of coercion, duress, or misrepresentation, merely reciting facts that she believes indicate the conditions under which the agreement was reached. See, e.g., *In re Marriage of Brandt*, 489 N.E.2d 902 (Ill. App. Ct. 1986). The doctrinal niceties in fact seem to obscure the central issue: why do women enter objectively unfair agreements?

428. If a trial court vacates an agreement, trial will likely follow. Court concern over crowded dockets, judicial dislike of divorce cases, and strongly worded statutes favoring divorce settlements provide ample incentive for trial courts to deny petitions to vacate, many times without allowing an evidentiary hearing. See *In re Marriage of Hoppe*, 580 N.E.2d 1186 (Ill. App. Ct. 1991); *In re Marriage of Burch*, 563 N.E.2d 1049 (Ill. App. Ct. 1990); *In re Marriage of Beck*, 404 N.E.2d 972 (Ill. App. Ct. 1980); *Dendrinis v. Dendrinis*, 374 N.E.2d 1016 (Ill. App. Ct. 1978). Since most challenges likely are brought by dependent wives, gender bias provides additional inducement.

429. The costs of appeal provide a substantial impediment for economically dependent spouses. See *Missouri Gender Bias Report*, *supra* note 43, at 539; *Florida Gender Bias Report*, *supra* note 43, at 810-11.

430. See *In re Brandt*, 489 N.E.2d 902.

431. See *id.*; Report of Proceedings (Dec. 19, 1983), (Doris Brandt) at

Virgil had an eighth grade education; Doris had graduated from high school.⁴³² The couple had two children, both of whom were adults by the time of divorce.⁴³³ Throughout the marriage, Virgil was a self-employed farmer.⁴³⁴ During the marriage, Doris completed several college accounting courses.⁴³⁵ At the time of divorce, she was employed as an accountant for the Harrisonville Telephone Company at an annual salary of \$26,400.⁴³⁶

Doris and Virgil's marriage had been troubled for years.⁴³⁷ Virgil dominated Doris, and according to Doris' second attorney, Virgil emotionally abused her.⁴³⁸ At the divorce hearing, Doris testified that during their marriage Virgil had participated in mentally cruel conduct that kept her nervous and upset.⁴³⁹ The judge granted the divorce on grounds of "extreme and repeated mental cruelty."⁴⁴⁰

Doris worked during most of the marriage, routinely turning her paycheck over to Virgil who invested all extra funds in the family farm and other enterprises.⁴⁴¹ Even the inheritance Doris received from her parents was given to Virgil to invest in the farm.⁴⁴² Virgil made all of the important financial decisions in the family, usually telling Doris what he was going to do but not seeking her advice or permission.⁴⁴³ In 1982, after twenty-six years of marriage,

2, *In re Marriage of Brandt*, 489 N.E.2d 902 (Ill. App. Ct. 1986) [hereinafter *Doris Brandt Proceedings* 1983].

432. *See In re Brandt*, 489 N.E.2d at 903.

433. *See Doris Brandt Proceedings* 1983 *supra* note 431, at 2. One child was 24 and the other 19 at the time of the hearing. *See id.*

434. *See id.* at 2.

435. *See In re Brandt*, 489 N.E.2d at 903.

436. *See id.* at 44.

437. Evidently Doris had attempted to leave the marriage nine years before the ultimate separation. *See Doris Brandt Proceedings* 1983 *supra* note 431, at 53.

438. *See Telephone Interview with Doris' second attorney* (Mar. 7, 1997).

439. *See Doris Brandt Proceedings* 1983 *supra* note 431, at 2-3.

440. *Id.* at 3. Too much, however, should not be made of Doris' testimony or the judge's findings. Doris gave no specific instances of Virgil's mental cruelty, the trial court accepted her limited testimony as sufficient to establish grounds for divorce, and Illinois did not allow no-fault divorce in 1983 when the divorce hearing took place.

441. *See Telephone Interview with Doris Brandt* (Mar. 10, 1997).

442. *See id.*

443. *See id.*

Doris told Virgil she wanted a divorce.⁴⁴⁴ She was forty-six and Virgil was forty-nine years old.⁴⁴⁵

Virgil proposed that they see the same local attorney.⁴⁴⁶ Doris replied that she should have her own attorney, but Virgil persuaded her that using one attorney would keep legal fees to a minimum.⁴⁴⁷ The attorney to whom Virgil took Doris had represented Virgil in several commercial transactions.⁴⁴⁸ Moreover, after the divorce Virgil and the attorney maintained a business relationship, buying and selling land together.⁴⁴⁹

Virgil and Doris met the attorney at his office on a Saturday morning.⁴⁵⁰ During their conference, Virgil and Doris agreed that Virgil should retain the property necessary to continue farming and that Doris should receive a cash settlement.⁴⁵¹ Virgil and Doris disagreed, however, about how much money Doris should receive.⁴⁵² Virgil valued the marital estate at \$315,000.⁴⁵³

444. *See id.*

445. *See* Doris Brandt Proceedings 1983 *supra* note 431, at 2.

446. *See* Telephone Interview with Doris Brandt (Mar. 10, 1997).

447. *See id.*

448. *See* Telephone Interview with Doris' new attorney (Mar. 7, 1997).

449. *See id.*

450. *See* Report of Proceedings (Apr. 10, 1984), (Virgil Brandt) at 5, *In re* Marriage of Brandt, 489 N.E.2d 902 (Ill. App. Ct. 1986) [hereinafter Virgil Brandt 1984].

451. *See id.* at 12.

452. *See* Report of Proceedings (1984), (Doris Brandt) at 30, *In re* Marriage of Brandt, 489 N.E.2d 902 (Ill. App. Ct. 1986) [hereinafter Doris Brandt Proceedings 1984].

453. *See* Proceedings Virgil Brandt 1984 *supra* note 450, at 15. Doris describes the process of reaching the \$315,000 value as follows:

Q. Could you tell the Court what happened in Mr. Crowder's office that day?

A. Virgil and I were on one side of the table, and Mr. Crowder on the other. . . . The two of them went through, and I was listening, went through the acreage, real estate, the amounts, the values, the approximate value of the cattle on hand, what they figured was a fair value of the house, and the indebtedness was taken from that figure, and we came up with something like \$305,000.00 or \$315,000.00.

Q. When you say you are listening - - -

A. Virgil was basically doing the valuing, and Mr. Crowder was doing the writing, as I remember, and from time to time they would make comments to me about it.

Q. Did you express any opinion as to value?

A. I am not a realtor, I had no idea. I assumed Mr. Crowder was

The \$315,000 value stands in stark contrast to the values indicated on financial statements prepared by Virgil and Doris during their marriage.⁴⁵⁴ One financial statement prepared two years before the settlement negotiations indicated a net worth of \$764,045.⁴⁵⁵ A second statement prepared only six months before the settlement conference indicated a net worth of \$618,000.⁴⁵⁶ When these statements were prepared the only knowledge Doris had of property values was whatever Virgil told her, or what he told the bank officer to put down on the statement.⁴⁵⁷ These

representing both of us, and if he thought I wasn't getting a fair shake, he would open his mouth or say differently.

Doris Brandt Proceedings 1984 *supra* note 452, at 30.

454. *See id.*

455. *See* Virgil Brandt Proceedings 1984, *supra* note 450, at 11.

456. *See id.* at 6. Virgil also testified that this financial statement omitted an \$80,000 debt. *See id.* at 7. This reduced the value of the marital property to \$538,000.

457. *See* Doris Brandt Proceedings 1984 *supra* note 452, at 32. At trial Doris explained how the couple arrived at the figures in the financial statements:

Q. I am going to hand you a document marked as Petitioner's Exhibit No. 3 and ask if you can identify that.

A. It is the Financial Statement we furnished Federal Land Bank Association.

Q. That is signed by you?

A. Yes.

Q. And signed by Virgil?

A. Right.

Q. Who prepared that statement?

A. I would think Cletus Rau, the one that wrote these figures down in front of both of us at the Federal Land Bank office in Belleville.

Q. Who established the values?

A. Virgil and Mr. Rau.

Q. Did you participate in the establishment of those values of the real estate?

A. No, I did not.

Q. Do you have any independent knowledge of the value of that real estate?

A. Other than what I am told it is worth, no.

Q. Other than what you were told it is worth by whom?

A. Virgil. He was the basis for this.

Q. I hand you what is marked Petitioner's Exhibit No. 2 and ask if you can identify that.

A. Yes, that is our Financial Statement presented to the First National Bank of Waterloo.

Q. And have you signed that?

A. Yes, I did.

statements were submitted to local banks, who in turn granted Virgil and Doris the farming loans they requested.⁴⁵⁸

In spite of the difference in the representations of net worth on the financial statements and the representations made by Virgil during settlement negotiations, no one obtained an independent appraisal prior to settlement.⁴⁵⁹

Q. And is Virgil's signature on there also?

A. Yes.

Q. How were those values arrived at?

A. I believe each year we were asked to present a new one revised each year. He would take one from a prior year and pencil in figures, and changes if any, and I typed it and signed it.

Q. Was there discussion between you as to arrival at the values?

A. Discussion? No. I knew pretty well what the indebtedness was. I knew pretty well what we owed on these items. If there were any changes as to equipment and that, he did the change. I typed up a new one from his figures.

Id. at 31-33. At trial Virgil tried to make it seem as though Doris knew as much as he did about the value of the farm property, machinery, and crops. *See* Virgil Brandt Proceedings 1984, *supra* note 450, at 7-12. In this author's opinion, his testimony is evasive and unconvincing.

458. *See id.* at 8, 11.

459. At trial Doris' expert appraiser valued the land owned jointly by Virgil and Doris at \$275,000 and the land owned by the farming corporation at \$664,000. *See* Report of Proceedings (Apr. 10, 1984), (Kelly G. Martin) at 25-27, *In re* Marriage of Brandt, 489 N.E.2d 902 (Ill. App. Ct. 1986). Virgil (and Doris) owned a one-third interest in the farming corporation, making the value of Virgil and Doris' portion \$225,000, according to Doris' expert. The farming corporation owed Virgil and Doris approximately \$39,000. *See* Virgil Brandt Proceedings 1984, *supra* note 450, at 13-14; Doris Brandt Proceedings 1984, *supra* note 452, at 33; Virgil Brandt Proceedings 1984, *supra* note 450, at 17. The parties stipulated that the farming equipment was worth between \$73,000 and \$78,000. *See* Report of Proceedings (Apr. 10, 1984), (Floyd Crowder) at 96, *In re* Marriage of Brandt, 489 N.E.2d 902 (Ill.App.Ct. 1986) [hereinafter Floyd Crowder Proceedings Apr. 1984]. The livestock apparently was valued at approximately \$10,000. *See* Doris Brandt Proceedings 1984, *supra* note 452, at 36. Adding these figures together, the marital estate approached \$619,000—surprisingly close to the amount on the most recent financial statement. If this estimate is accurate Doris received 12% of the marital assets, while Virgil received 88%. Virgil's experts, however, testified that the real estate was worth substantially less. *See* Floyd Crowder Proceedings Apr. 1984, *supra*, at 103-06, 130. Moreover, Virgil testified that the jointly owned property was burdened with \$178,000 of debt and that his portion of the farming corporation was burdened with \$187,000 of debt. Using Doris' expert's evaluation of the property and Virgil's testimony about debt as accurate, the net value of the marital estate would approximate

Accustomed to Virgil's authority, Doris did not contest Virgil's estimates.⁴⁶⁰ She did, however, object to Virgil's failure to include in the marital assets a one-third interest that the couple owned in a farming corporation,⁴⁶¹ and approximately \$37,000 in promissory notes that the farming corporation owed to Virgil.⁴⁶² The farming corporation gave these promissory notes to Virgil in return for monies loaned to the corporation from Virgil and Doris' joint checking account.⁴⁶³ Doris claims that Virgil told her that she had no right to the farming corporation or the promissory notes.⁴⁶⁴ The attorney told Doris those assets

\$254,000. At trial Virgil himself testified that during negotiations in Mr. Crowder's office a net value of \$247,000 rather than \$305,000, was placed on the marital property. See Virgil Brandt Proceedings 1984, *supra* note 450, at 12-13. Even using this lower figure, Doris would have received only 30% of the marital assets, while Virgil received 70%. Virgil, however, is the only person who testified that the amount agreed to during negotiations was only \$247,000. Mr. Crowder himself, testified that the notes that he kept during negotiation indicated the parties had agreed that the value of the marital estate was \$410,000. See Report of Proceeding (Aug. 7, 1984), (Floyd Crowder) at 78, *In re Marriage of Brandt*, 489 N.E.2d 902 (Ill. App. Ct. 1986) [hereinafter Floyd Crowder Proceedings Aug. 1984]. Mr. Crowder also indicated that this figure was mistaken because it failed to reflect a \$37,500 house debt. Later Mr. Crowder indicates that the \$315,000 value placed on the marital estate during negotiations should have been reduced by an outstanding debt, presumably the house debt referred to earlier. See *id.* at 79. Using Mr. Crowder's figures, the value placed on the marital estate during negotiations was somewhere between \$372,500 and \$277,500. Doris also testified that a value of between \$305,000 and \$315,000 was placed on the marital assets during negotiations. See Doris Brandt Proceedings 1984, *supra* note 452, at 30.

460. Later, at trial, both Virgil's and Doris' experts testified that the value of the marital estate exceeded \$315,000.

461. Virgil and Doris owned approximately 217 acres, See Virgil Brandt Proceedings 1984, *supra* note 450, at 3-4. And the farming corporation owned approximately 767 acres. See *id.* at 3. The Brandts' owned a one-third interest in the farming corporation.

462. Also excluded from the marital estate was Doris Brandt's pension plan with the Harrisonville Telephone Company. See Doris Brandt Proceedings 1984, *supra* note 452, at 35. The record contains no indication of the value of Doris' pension plan, nor does it mention whether Virgil had any pension plan.

463. See *id.* at 33.

464. See Telephone Interview with Doris Brandt (Mar. 10, 1997). At trial Virgil denied telling Doris she had no rights in the corporation, rather he claimed that he only told her that the corporation was worthless. See Virgil Brandt Proceedings 1984, *supra* note 450, at 12, 18-19.

were worthless anyway.⁴⁶⁵ No investigation was made into Doris' rights in the farming corporation, nor was any appraisal of its value obtained.⁴⁶⁶ Doris suggested that she would like the settlement agreement to contain a paragraph protecting her right to the promissory notes if they were paid in the future.⁴⁶⁷ Throughout the conference, Doris thought the lawyer was representing her and Virgil,⁴⁶⁸ and she expected the lawyer to tell her if she was not getting what she was entitled to have.⁴⁶⁹

During the conference Doris initially offered to accept 40% of the marital assets, or \$126,000.⁴⁷⁰ Virgil resisted, saying he was willing to pay her only \$50,000.⁴⁷¹ The lawyer told them both that a court would likely make a fifty-fifty distribution of the marital assets.⁴⁷² Moreover, the lawyer told Virgil that Doris was entitled to more than \$50,000.⁴⁷³ Virgil then offered Doris \$60,000.⁴⁷⁴ Doris insisted that she get \$100,000.⁴⁷⁵ Virgil countered with an offer of \$75,000.⁴⁷⁶

Throughout the conference Doris was distraught and

465. See Telephone Interview with Doris Brandt (Mar. 10, 1997). The attorney, Mr. Crowder, testified at trial that Virgil, not Mr. Crowder, indicated that the farming corporation was worthless. See Floyd Crowder Proceedings Aug. 1984, *supra* note 459, at 72.

466. This information was absent from the trial transcript.

467. At trial Virgil admitted that during the settlement conference he and Doris discussed the money they had put into the farming corporation and that Doris indicated she would like her share. According to Virgil, he told Doris that if he ever got his money out of the corporation, he'd be glad to give her share. That understanding, Virgil admitted, was never put into the agreement. See Virgil Brandt Proceedings Apr. 1984, *supra* note 450, at 17-18.

468. When asked during the hearing whether the lawyer was representing him during the settlement conference, Virgil replied, "I think he was representing both of us." See *id.* at 21.

469. See Telephone Interview with Doris Brandt (Mar. 10, 1997); see also Doris Brandt Proceedings 1984, *supra* note 452, at 30.

470. See Doris Brandt Proceedings 1984, *supra* note 452, at 37.

471. See *id.* at 37.

472. See *id.* at 48. Why Doris asked for only 40% of the marital assets rather than the 50% the lawyer indicated she was entitled to remains unknown. One might speculate, however, that Doris felt guilty because she had become involved with another man prior to the actual separation. See *id.* at 45.

473. See *id.* at 48.

474. See *id.*

475. See *id.* at 47.

476. See *id.* at 48.

depressed.⁴⁷⁷ As negotiations proceeded, it seemed to her that all of her years of labor⁴⁷⁸ and all of her financial contributions counted for little in the end.⁴⁷⁹ She felt stunned and betrayed.⁴⁸⁰ She just "could not believe that everything was so one-sided."⁴⁸¹ By the time Virgil made his final offer of \$75,000, Doris felt resigned.⁴⁸² She tried to get him to agree to more, but he refused.⁴⁸³ Doris accepted the \$75,000 without interest,⁴⁸⁴ even though the \$75,000 was to

477. See Telephone Interview with Doris' new attorney (Mar. 7, 1997).

478. In addition to her economic and caretaking contributions to the marriage, Doris explained that she took one week of her two week vacation each year to help plant the crops. She took the other week to help harvest the crops. See Telephone Interview with Doris Brandt (Mar. 10, 1997).

479. See *id.*

480. See *id.* Doris further explained that Virgil laid claim even to small items that had personal significance only to her, like a set of silver given to Doris by co-workers. At one point Virgil demanded that he be given the truck and that the younger daughter, away at college, be given the automobile, leaving Doris without a vehicle. The lawyer told him that Doris had to have a car. See *id.*

481. See *id.* Doris' words echo those of a divorced woman in Weitzman's study on the California divorce courts: "It's horrible when you have to face how little you are worth—what a low value the society places on all those years of your life. . . ." WEITZMAN, *supra* note 14, at 173. Another woman in the same study commented:

I figured it out. After ten years of marriage I got \$200 a month for five years. That comes out to \$1,100 for each year of marriage. That means I was his 60-hour-a-week servant for \$100 a month. Just about slave labor . . . housekeeper, nurse, chauffeur, mother. And prostitute—that's what I felt like . . . It's an insult.

Id.

482. See Telephone Interview with Doris Brandt (Mar. 10, 1997).

483. When questioned at trial about why she finally accepted the \$75,000, Doris replied, "I felt we had been there all day. He is a very insistent person, and I felt I wasn't going to get any further with him." Doris Brandt Proceedings 1984, *supra* note 452, at 37.

484. Doris' lawyer questioned her about why she had not demanded interest:

Q. Was there a discussion as to interest?

A. Yes, he wouldn't pay that, so I went along with the fact if he wouldn't, he wouldn't.

Q. Did you receive any advice about the payment of interest or what you were entitled to?

A. Mr. Crowder had brought it up in the conversation, yes, but Virgil wouldn't buy it.

Q. Why did you accept these figures at no interest rate?

A. I felt that Mr. Crowder was representing me as well as Virgil.

be paid out over a six-to-seven year period.⁴⁸⁵

Doris and Virgil returned home.⁴⁸⁶ Over the weekend Doris claimed that Virgil continued to pressure her.⁴⁸⁷ The attorney called and said the agreement was ready to be signed.⁴⁸⁸ On Monday evening, the parties returned to the attorney's office and met with another attorney who had prepared the settlement agreement.⁴⁸⁹ Doris remained distraught; her sense of betrayal persisted and she was depressed and numb.⁴⁹⁰ The new attorney explained that she was to receive a cash settlement and that deeds to property were to be executed and titles to automobiles transferred.⁴⁹¹ The lawyer told Virgil and Doris to look over the agreement and that he would answer any questions; he did not go through the agreement and explain the meaning of each paragraph.⁴⁹² Doris was never told, for instance, that she was forever relinquishing her rights to spousal support

If he thought I deserved it, he would have forced the issue. And like I said a few sentences ago, I didn't think I was going to get any further. Virgil wouldn't and that was it.

Q. What led you to believe you wouldn't get any further with Virgil?

A. He is a very headstrong man with his own mind. I had lived with him enough years to know he doesn't change his mind.

Id. at 38.

485. See Floyd Crowder Proceedings 1984, *supra* note 459, at 88.

486. See Doris Brandt Proceedings 1984, *supra* note 452, at 38.

487. The following colloquy occurred between Doris and her attorney:

Q. Any pressure between the 25th and 27th?

A. Yes, there was.

Q. Could you explain that?

A. A lot of conversation, strong language, no physical abuse.

Q. How would you characterize the strong language? Explain that.

A. Loud conversations and very - - - He was very determined to get his way. He was just quite a talker.

Q. Did you feel you had any choice?

A. No, I did not feel I had any choice.

Id. at 43.

488. See *id.*

489. See Virgil Brandt Proceedings 1984, *supra* note 450, at 20.

490. See Telephone Interview with Doris Brandt (Mar. 10, 1997).

491. See *In re Marriage of Brandt*, 489 N.E.2d 902, 906 (Ill. App. Ct. 1986).

492. See Virgil Brandt Proceedings 1984, *supra* note 450, at 20-21; Doris Brandt Proceedings 1984, *supra* note 452, at 35; Report of Proceedings (Aug. 7, 1984), (Arlie Traugher) at 60, *In re Marriage of Brandt*, 489 N.E.2d 902 (Ill. App. Ct. 1986)[hereinafter Arlie Traugher Proceedings 1984].

and maintenance.⁴⁹³ This attorney testified at trial that he provided no explanation of the document he had prepared and that he represented neither party.⁴⁹⁴ Doris signed the agreement.⁴⁹⁵ From beginning to end, the second conference took no more than twenty minutes.⁴⁹⁶ When asked why Doris signed the agreement, Doris' new attorney explained that Doris had been distraught, that she had trusted the lawyer, and that Virgil had always dominated Doris.⁴⁹⁷ Doris also reported that she trusted the lawyer.⁴⁹⁸ The agreement did not contain the paragraph that Doris had requested regarding the promissory notes.

Under the agreement, Doris received a 1979 Mercury automobile, miscellaneous items of personal property, and \$75,000 to be paid in installments with no interest—approximately twenty-four percent of the value of the marital assets.⁴⁹⁹ Virgil received \$240,000 in farm property and equipment and various items of personal property—approximately seventy-six percent of the marital estate.⁵⁰⁰ Virgil also received a one-third interest in the farming corporation and \$37,900 in promissory notes.⁵⁰¹ Both Doris and Virgil waived their respective rights to spousal maintenance.⁵⁰² Doris' new lawyer insists, "Virgil made out like a bandit."⁵⁰³

Afterwards, when Doris told a niece who worked for a lawyer about the agreement, the niece protested that the terms were unfair.⁵⁰⁴ Doris sought the advice of a second

493. See Doris Brandt Proceedings 1984, *supra* note 452, at 35.

494. See Arlie Traugher Proceedings 1984, *supra* note 492, at 61.

495. See Doris Brandt Proceedings 1984, *supra* note 452, at 50.

496. See *id.*

497. See Telephone Interview with Doris' new attorney (Mar. 7, 1997).

498. See *id.*; Doris Brandt Proceedings 1984, *supra* note 452, at 30, 38.

499. At trial both parties introduced expert appraisals of the value of the couple's jointly owned property and the farming corporation. Virgil also introduced evidence of the debt on the jointly owned property and the farming corporation. None of these appraisals reflect the net values placed on the financial statements.

500. See *In re Marriage of Brandt*, 489 N.E.2d 902, 903-04 (Ill. App. Ct. 1986).

501. See *id.*

502. See *id.* at 903.

503. See Telephone Interview with Doris' new attorney (Mar. 7, 1997).

504. See Telephone Interview with Doris Brandt on (Mar. 10, 1997).

lawyer who agreed with the niece.⁵⁰⁵ The new attorney represented Doris at the trial when she asked the court to set aside the agreement.⁵⁰⁶ The attorney that allegedly had represented both parties during the negotiations represented Virgil at the trial and on appeal.⁵⁰⁷ He justified his representation of Virgil by claiming to have performed as a mediator and not a lawyer during the negotiations.⁵⁰⁸ Doris claimed she had never heard of mediation, nor did the attorney ever explain that he was acting as a mediator.⁵⁰⁹ The trial court refused to set aside the agreement, and Doris appealed.⁵¹⁰

A sensitized reader can see how Doris was set up to accept an objectively bad deal. First, although Doris worked outside the home, Virgil controlled the family finances, including Doris' paycheck.⁵¹¹ Virgil's authority carried over to the divorce negotiations and predisposed Doris to accept his valuation of the property and his claim that she had no interest in the farming corporation and promissory notes, or alternatively, that these assets lacked value.⁵¹² Second, Doris began negotiations asking for forty percent of the marital assets,⁵¹³ illustrating that her initial expectations were low compared to Virgil's. Third, still steeped in norms of fairness, trust, and sharing, Doris was depressed and stunned by her immersion in a world governed by self-interest. The law, she was told, provided little recognition for her twenty-six years of hard work and her financial contributions to the marriage. She became an easy target for Virgil's aggressive bargaining tactics. Fourth, Virgil had

505. *See id.*

506. *See* Telephone Interview with Doris' new attorney (Mar. 7, 1997).

507. *See id.*

508. *See id.*

509. *See* Telephone Interview with Doris Brandt (Mar. 10, 1997).

510. *See In re Marriage of Brandt*, 489 N.E.2d 902, 903 (Ill. App. Ct. 1986).

511. *See* Telephone Interview with Doris Brandt (Mar. 10, 1997).

512. I was unable to determine from the conversations I had with Doris and her second lawyer whether the promissory notes and the interest in the farming corporation had value. Doris, however, was predisposed to accept Virgil's assertions as to their value, irrespective of their correctness. Moreover, Virgil clearly was wrong about Doris' lack of interest in these properties since they both had been purchased with marital funds during the marriage.

513. *See* Doris Brandt Proceedings 1984, *supra* note 452, at 37.

emotionally abused Doris for years, enhancing her depression, lowering her self-esteem, and leaving her prone to his continued dominance during negotiations. Fifth, the lawyer did very little to protect Doris' interests. He accepted, without question, Virgil's evaluation of the marital assets. He made no investigation of Doris' legal rights to the farming corporation and promissory notes, and he did not seek an independent evaluation of those assets.⁵¹⁴ Rather, he actively encouraged Doris to forego any right to them by claiming they lacked value. He ultimately failed to include those assets in the settlement agreement. The lawyer was plainly instrumental in securing Doris' agreement to an unfair settlement. Moreover, the lawyer then turned against Doris and represented Virgil at trial, actually testifying against Doris and cross-examining her during the proceeding.

Was the agreement unconscionable? The appellate court did not believe so.⁵¹⁵ First, the appellate court omitted or reconstructed many of Doris' experiences. Rather than recognize Virgil's dominance, the court implied that Doris was at least Virgil's equal because she had taken some college courses and she worked as an accountant.⁵¹⁶ No mention was made of Doris' financial contributions to the marriage. The court also failed to note that the attorney allegedly representing both Virgil and Doris had represented Virgil in commercial transactions, represented Virgil at trial, and also represented Virgil on appeal. The court also de-emphasized the inequity of the property distribution by noting that Doris received \$75,000 in cash, while declining to mention that Virgil received \$240,000 or seventy-six percent of the marital estate.⁵¹⁷ Finally, the court never acknowledged Doris' emotional state during the negotiations. Rather, it spoke of offers and counter-offers, depicting Doris as an assertive negotiator and implying that she really did not need an attorney's advocacy.

On appeal, Doris claimed that Virgil's misrepresentation of the value of the marital assets, her lack of representation by independent counsel, and the haste with which the agreement was contrived created

514. See Floyd Crowder Proceedings 1984, *supra* note 459, at 72.

515. See *In re Brandt*, 489 N.E.2d at 906.

516. See *id.* at 903.

517. See *id.*

sufficiently questionable conditions to fulfill the first prong of the unconscionability test.⁵¹⁸ Regarding Virgil's misrepresentation of the value of the marital assets, the appellate court found that the trial court did not abuse its discretion by rejecting the testimony of the experts, and by finding that the husband did not misrepresent the value of the marital estate.⁵¹⁹ Without so stating, the appellate court seemed to impute negligence to Doris for her failure to discover the actual value of the marital estate and to investigate her rights in the farming corporation and promissory notes—a theme found in several other cases.⁵²⁰ It did not consider the possibility that pre-existing marital dynamics, including Doris' mental state, her lack of independent knowledge, and her reliance upon the attorney, substantially inhibited her ability to protect herself. Moreover, the court implicitly condoned Virgil's misstatements and hard bargaining tactics which, even if suitable between competitors in the market place, ought to have no place in negotiations between spouses.

Regarding Doris' lack of independent counsel, the court found it enough that the attorney had informed her that a court would most likely award her half of the marital assets.⁵²¹ The court seemed oblivious to both the self-serving nature of the lawyer's testimony and its questionable veracity. Even if the lawyer did inform Doris, Doris needed more than information to protect herself. The court imputed to her a fictitious equality with her husband, ignored her inexperience, socialization, and emotional condition, and condoned a lawyer's clearly improper behavior.

Regarding Doris' claim that the agreement was hastily contrived and not a product of her free will, the court found the twenty minutes that Doris had to review the agreement sufficient.⁵²² Additionally, the court stated that Doris "chose" to devote only twenty minutes to reviewing the agreement, implicitly attributing haste and negligence to her.⁵²³ The court concluded that the conditions under which

518. *See id.* at 904.

519. *See id.*

520. *See supra* note 103.

521. *See In re Brandt*, 489 N.E.2d at 905.

522. *See id.* at 905-06.

523. Joan Williams explains how choice rhetoric frequently is used in family law to deny structural patterns of inequality between men and women. Women are perceived as equal—they simply make different

the agreement was entered did not support a finding that Doris had satisfied the first prong of the unconscionability standard.⁵²⁴

Turning to the second prong, the court noted that unequal distribution does not itself establish unconscionability.⁵²⁵ It observed that Doris' salary of \$26,400 and her \$75,000 property distribution did not "leave her destitute," and concluded that the agreement was not one-sided enough to be unconscionable.⁵²⁶

The circumstances of Doris' case are not unusual. Commercial contract doctrine, particularly as applied by gender-biased judges, does not capture women's experiences during marriage and divorce negotiations. Courts typically look disfavorably upon financially dependent wives for "choosing" to forego legal representation.⁵²⁷ For instance, Elaine Beattie had been married to Joseph Beattie for twenty-four years when Joseph sought a divorce.⁵²⁸ Elaine worked at K-Mart earning approximately \$5,500 to \$6,000 per year.⁵²⁹ Joseph worked as a self-employed farmer earning approximately \$10,000 per year.⁵³⁰ The couple had four minor children.⁵³¹ Prior to and during the divorce Elaine was treated for mental problems.⁵³² On June 2, 1975, Elaine Beattie's husband took her to the office of his attorney, Watts Johnson.⁵³³ Johnson prepared a property settlement agreement in which Elaine received no spousal maintenance, approximately twenty-five percent (\$25,000) of the marital assets, custody of the four minor children, and child support in a smaller amount than recommended

choices than men might make. See Williams, *supra* note 26, at 2241. Women "choose," for instance, to marginalize their careers in order to fulfill caregiving responsibilities, or women "choose" to remain unemployed during marriage. See *id.* at 2241 & n.62. Williams argues that this distorted version of equality distinctly disadvantages women at divorce. See *id.* at 2241; see also O'Connell, *supra* note 256, at 500.

524. See *In re Brandt*, 489 N.E.2d at 906.

525. See *id.* at 906.

526. See *id.*

527. See, e.g., *In re Marriage of Broday*, 628 N.E.2d 790 (Ill. App. Ct. 1983).

528. See *Beattie v. Beattie*, 368 N.E.2d 178, 180 (Ill. App. Ct. 1977).

529. See *id.* at 184.

530. See *id.* at 180, 184.

531. See *id.* at 180.

532. See *id.* at 181.

533. See *id.* at 180.

by the Bureau County Bar Association.⁵³⁴ After preparing the agreement, Johnson called another attorney, Donald Bird, to come to his office to represent Elaine.⁵³⁵ Elaine had never met nor talked to Bird before he appeared at Johnson's office.⁵³⁶ When he arrived, Bird reviewed the settlement agreement with Elaine and inquired whether she was sufficiently composed to act as the plaintiff in the divorce proceeding.⁵³⁷ Bird spent no time alone with Elaine until the following day, June 3, when he walked with her from Johnson's office to the courthouse for the divorce hearing.⁵³⁸ The judge granted the divorce on June 3, incorporating the parties' settlement in his final order.⁵³⁹ Elaine's extreme anxiety over the divorce led her to check herself into the Methodist Hospital of Central Illinois, where she was diagnosed with anxiety neurosis as a result of the divorce.⁵⁴⁰ Upon regaining her composure on June 24, Elaine requested the court to vacate the final judgment, alleging among other things that she lacked the benefit of private counsel during the divorce negotiations.⁵⁴¹ The trial court denied her petition, and Elaine appealed.⁵⁴² In upholding the trial court, the appellate court noted that during the divorce negotiations Elaine had not wanted an independent attorney.⁵⁴³ The court apparently gathered this information from the self-serving testimony of Johnson, Joseph's attorney.⁵⁴⁴ The court concluded that Elaine had made a knowing decision to forego independent representation.⁵⁴⁵

Courts also minimize wives' complaints of anxiety, depression, and mental distress, commonly noting that divorce always causes stress.⁵⁴⁶ In Elaine Beattie's case, for

534. *See id.*

535. *See id.*

536. *See id.*

537. *See id.* at 181.

538. *See id.*

539. *See id.* at 179.

540. *See id.* at 181.

541. *See id.* at 179.

542. *See id.*

543. *See id.* at 182.

544. *See id.*

545. *See id.*

546. *See, e.g., In re Marriage of Flynn*, 597 N.E.2d 709, 714, 173 (Ill. App. Ct. 1992). *But see In re Marriage of Frey*, 630 N.E.2d 466, 466-470 (Ill. App. Ct. 1994) (considering the wife's emotional distress in

instance, she alleged that her emotional condition during divorce negotiations impaired her capacity to contract.⁵⁴⁷ The severity of her condition led her to admit herself to a local hospital immediately following the divorce, but the appellate court credited the trial court's finding that Elaine, although obviously upset during the divorce proceedings, was no more upset and nervous than normal.⁵⁴⁸ The trial court also noted that Elaine's mental illness was not particularly acute.⁵⁴⁹ Unsurprisingly, Elaine fared no better with this argument than with her argument regarding independent legal counsel.⁵⁵⁰

Divorce attorneys typically coach their clients about how to respond to the routine pattern of questions at the final divorce hearing. Generally these questions include whether the client believes the marriage is irretrievably broken, whether the client understands the settlement agreement, whether the client believes the settlement is equitable, and whether the client agrees to the settlement's terms. Of course, emotionally impaired people can give rehearsed answers to the anticipated questions, but when faced with claims of duress or coercion, courts point to this coached testimony and impute actual understanding and willing assent to wives.⁵⁵¹ To return once more to Elaine Beattie's case, she claimed that her mental condition

upholding a trial court's finding of unconscionability).

547. *See* Beattie, 368 N.E.2d at 182. In preparing this paper I read more than 60 Illinois cases. In some of them, husbands challenged settlements. Interestingly, in these cases no court ever mentioned that husbands "normally" are emotionally upset at divorce.

548. *See id.* at 183.

549. *See id.*

550. Gender bias as well as contract doctrine probably contributed to this decision. Negative stereotypes of women abound because women are emotional creatures, and signs of emotionality during divorce are merely to be expected.

551. *See, e.g., Crawford v. Crawford*, 350 N.E.2d 103 (Ill. App. Ct. 1976) (reversing the trial court's denial of wife's petition to vacate); *Byrne v. Byrne*, 643 N.Y.S.2d 659 (N.Y. App. Div. 1996) (finding the wife had "unequivocally agreed" to the terms of a stipulation that concededly contained several concessions regarding the husband's financial obligations). If an attorney reads a settlement's terms into the record in open court and competent counsels represent both parties, New York courts are reluctant to vacate the agreement. *See, e.g., Burkart v. Burkart*, 582 N.Y.S.2d 783 (N.Y. App. Div. 1992); *Zioncheck v. Zioncheck*, 470 N.Y.S.2d 950 (N.Y. App. Div. 1984).

impaired her ability to understand the agreement's terms.⁵⁵² In response, the appellate court referred to Elaine's trial testimony and quipped, "If she said that she understood, she understood."⁵⁵³

Even more troublesome are cases like Mary Ann's in which courts misconstrue a wife's equivocal testimony as her willing acquiescence.⁵⁵⁴ At the age of sixty-six, Mary Ann Flynn filed for divorce from her husband George, a fifty-four year old music professor.⁵⁵⁵ Mary Ann had poor health and little likelihood of employment.⁵⁵⁶ The agreement her attorney urged her to enter provided no maintenance.⁵⁵⁷ Instead, it allotted her sixty-two percent of the marital assets, including one-half of George's retirement account.⁵⁵⁸ Because of her age, Mary Ann could immediately remove her portion of George's pension and draw from a life-long annuity that would generate an annual income of \$8,400.⁵⁵⁹ The appellate court never indicated the value of the remaining assets, or the amount of George's income.⁵⁶⁰ At final hearing, Mary Ann testified about the settlement, and the trial court incorporated the settlement into the final judgment of dissolution.⁵⁶¹ Soon after judgment was entered, Mary Ann, proceeding pro se, filed a petition asking the court to vacate the agreement.⁵⁶² She argued that her attorney coerced her into accepting the agreement⁵⁶³ and that the agreement was unconscionable because it provided no maintenance.⁵⁶⁴ The trial court denied her petition and Mary Ann appealed.⁵⁶⁵

In addressing Mary Ann's claim of unconscionability, the appellate court quoted her trial testimony to illustrate that Mary Ann knew that the agreement provided no

552. See Beattie, 368 N.E.2d at 182.

553. See *id.* at 183; see also *In re Marriage of Steadman*, 670 N.E.2d 1146, 1151 (Ill. App. Ct. 1996).

554. See *In re Marriage of Flynn*, 597 N.E.2d 709 (Ill. App. Ct. 1992).

555. See *id.* at 710, 713.

556. See *id.* at 713.

557. See *id.*

558. See *id.*

559. See *id.*

560. See *id.*

561. See *id.* at 711-12.

562. See *id.* at 712.

563. See *id.* at 713.

564. See *id.* at 712-13.

565. See *id.* at 712.

maintenance and that she willingly acquiesced to the agreement's terms.⁵⁶⁶ First, the court offered a colloquy between Mary Ann and her attorney Mr. Bickley:

"[Bickley] Are you willing then to waive maintenance in return for a higher percentage of the proceeds to be acquired by the sale of the assets of this particular marital property?

[Mary Ann] I'm just—I'm trying to do math in my head and I'm not that good at it. So, I'm waiving maintenance for all time, no matter what happens to me or what my physical condition is?

[Bickley] That's correct. Once you waive maintenance—

[Mary Ann] For the sake of eight per cent being given to me as opposed to being given to my husband?

[Bickley] You are in effect being given between eight and ten per cent more of the assets of this estate than you would be entitled to under the current law.

[Mary Ann] Otherwise I get fifty per cent? Is that —

[Bickley] You get fifty per cent.

[Mary Ann] Yes.⁵⁶⁷

The trial judge then explained to Mary Ann that the marital assets need not be divided equally, but that the court would consider the ability of each spouse to accumulate additional assets in the future as well as what assets Mary Ann would need to live comfortably without maintenance.⁵⁶⁸ Bickley then made another attempt to elicit appropriate responses from Mary Ann.

[Bickley] Well, the question that is presently pending before the Court, is do you understand now * * * that if you waive maintenance today, you can never come before this Court or any other court and ask for an imposition of maintenance for you, do you understand that?

[Mary Ann] Yes, I understand that. It's just such a big thing to understand to say yes, and say yes, and I agree, I'll do it. I'll never come back again, you know, no matter what my situation is.

[Bickley] Well, that is why we are here in court, Mrs. Flynn.

[Mary Ann] Yes.

566. *See id.* at 711-12.

567. *See id.* at 711.

568. *See id.*

[Bickley] We are here to get a dissolution of marriage.

[Mary Ann] Yes.

[Bickley] And to reach an accord with respect to all of the property rights between the parties.

[Mary Ann] All right.

[Bickley] Do you understand that?

[Mary Ann] I do understand that.⁵⁶⁹

The appellate court then quoted Mary Ann's responses to the questions of George's attorney, Mr. Kuhs.

[Kuhs] Do you feel that this is a fair settlement of this case under the circumstances?

[Mary Ann] A fair settlement? Is my answer going to determine anything that is going to happen here?

THE COURT: Do you feel that it is fair and equitable? Are you satisfied with it? Was there any force or coercion used upon you to enter into this agreement?

[Mary Ann] No. It seems like the best we can do under the circumstances.

THE COURT: Under the circumstances do you feel that it is fair and equitable?

[Kuhs] No one has threatened you or coerced you to sign this?

[Mary Ann] No one has threatened me.

[Kuhs] You are not under the influence of alcohol or any other medication or drugs today, are you?

[Mary Ann] Nothing at all.

[Kuhs] Thank you.⁵⁷⁰

Finally, the appellate court turned to an exchange with Mary Ann at the conclusion of the hearing.

[Mary Ann] May I ask a question? Was the subject of my health brought up?

THE COURT: Well, I would assume it was brought up in negotiations.

[Mary Ann] Was it?

[Bickley] Anything further?

[Kuhs] Thank you, your Honor.

THE COURT: You're welcome. Good luck.⁵⁷¹

What the appellate court perceived as Mary Ann's knowing acquiescence was probably the strongest protest

569. *See id.*

570. *See id.* at 712.

571. *See id.*

the sixty-six year old homemaker could muster.⁵⁷² The appellate court added insult by concluding, "[t]he fact that Mary Ann has since changed her mind should not render the settlement invalid."⁵⁷³

Courts minimize the duress mothers experience when threatened with a loss of custody.⁵⁷⁴ For instance, in August of 1994, Yolanda left her husband, Jeffrey, after nearly twenty years of marriage.⁵⁷⁵ She took their three youngest sons with her to the couple's summer home.⁵⁷⁶ The older two boys stayed with their father in Bolingbrook, Illinois.⁵⁷⁷ Jeffrey worked as a hospital administrator, earning approximately \$150,000 per year.⁵⁷⁸ Yolanda had not worked outside the home during the marriage.⁵⁷⁹ The court soon ordered Jeffrey to pay to Yolanda \$2,400 per month for unallocated family support.⁵⁸⁰

Sometime within the first year after separation, Yolanda decided to move to Wixom, Michigan with her three youngest sons.⁵⁸¹ On August 28, 1995, Jeffrey filed an emergency petition requesting the court to enjoin Yolanda

572. Chillingly Pateman reminds,

Civil mastery requires agreement from the subordinate and numerous stories are spun in which slaves and women in chains contract and consent to their subjection. In the famous pornographic story, *The story of O*, in which O, a woman, is imprisoned and used sexually by her captors, she is always asked before each assault and violation whether or not she consents. Men exercise their masculine capacity for political creativity by generating political relationships of subordination through contract.

PATEMAN, *supra* note 2, at 186-87.

573. *In re Flynn*, 597 N.E.2d at 714; *see also* Bryan, *supra* note 88, at 177-88; *In re Marriage of Steadman*, 670 N.E.2d 1146 (Ill. App. Ct. 1996); *Crawford v. Crawford*, 350 N.E.2d 103 (Ill. App. Ct. 1976) (reversing the trial court's denial of the wife's petition to vacate).

574. *See, e.g., In re Marriage of Hoppe*, 580 N.E.2d 1186 (Ill. App. Ct. 1991) (reversing and remanding the trial court's denial of the wife's petition to vacate). *But see In re Marriage of Carlson*, 428 N.E.2d 1005, 1011 (Ill. App. Ct. 1981) (considering the husband's threat to take custody of the children one important factor in finding the agreement unconscionable).

575. *See In re Steadman*, 670 N.E.2d at 1148.

576. *See id.*

577. *See id.*

578. *See id.*

579. *See id.*

580. *See id.*

581. *See id.*

from permanently removing the boys to Michigan.⁵⁸² A hearing was scheduled for three days later.⁵⁸³ On the date of the hearing, Jeffrey and his lawyer and Yolanda and her attorney appeared at the court.⁵⁸⁴ For two hours they all negotiated in the hallway outside the courtroom.⁵⁸⁵ Apparently, no discovery had been conducted prior to negotiations.⁵⁸⁶ At her attorney's urging, Yolanda orally agreed to accept what appears to be between seventeen and twenty-three percent of the marital assets⁵⁸⁷ and three years of minimal and non-modifiable rehabilitative spousal maintenance,⁵⁸⁸ in return for custody of her three youngest sons.⁵⁸⁹ Rather than argue the merits of Jeffrey's emergency petition, at the hearing Jeffrey, Yolanda, and their lawyers presented the terms of an oral settlement agreement to the trial court.⁵⁹⁰ On the basis of the testimony, the judge agreed to enter judgment on October 5, 1995.⁵⁹¹

On October 5th, Yolanda appeared in court with her new lawyer, Mr. Holden.⁵⁹² Mr. Holden requested a continuance, but the court declined and entered judgment.⁵⁹³ On November 5th, Yolanda filed a motion to vacate the judgment, arguing, among other things, that she suffered from duress during negotiations because of her extreme fear of losing her children.⁵⁹⁴ Yolanda's fear seemed credible because she had already lost her two older sons to Jeffrey, the court might have disapproved of her removal of the three youngest sons to Michigan, she only had three days notice of the emergency hearing, and she had minimal financial resources with which to fight Jeffrey.⁵⁹⁵ Moreover, the unfair financial terms to which she agreed suggested that her fear impaired her ability to exercise her free will—

582. *See id.*

583. *See id.*

584. *See id.*

585. *See id.*

586. *See id.*

587. *See id.* at 1149.

588. *See id.* at 1151-52.

589. *See id.*

590. *See id.* at 1148.

591. *See id.* at 1149.

592. *See id.*

593. *See id.*

594. *See id.* at 1149, 1151-52.

595. *See id.* at 1148.

she felt she had no other choice.⁵⁹⁶ The trial court, however, denied Yolanda's motion to vacate and the appellate court affirmed.⁵⁹⁷ In addressing Yolanda's duress argument, the appellate court stated:

Wife bears the burden of showing duress by presenting clear and convincing evidence that she was bereft of the quality of mind necessary to make a contract. While wife's fear that she may lose custody of her children no doubt caused her anxiety, we do not recognize this as a factor impairing her ability to exercise her free will and make a meaningful choice when the record reflects that she agreed to negotiations, took part in the negotiations and then presented the substance of these negotiations, under oath, to the trial court. Many spouses may experience anxiety when appearing in court because of a petition to dissolve a marriage and this anxiety is no doubt heightened when one fears she may lose custody of her children; however, this factor, without more, does not clearly and convincingly demonstrate that one lacked the ability to make a voluntary decision.⁵⁹⁸

Wives who allege that their attorneys coerced them into signing a poor agreement⁵⁹⁹ or inadequately represented

596. At the settlement hearing Yolanda testified as follows:

MR. KOZLOWSKI [Counsel for Wife]: And that's the agreement we worked out today in the hall, and we will reduce it to writing with the joint custody [agreement], and you're satisfied with that?

THE WITNESS [Wife]: I have no choice.

THE COURT: Well, ma'am, I want you to understand that you do have a choice. We can sit down right now and have a formal hearing and the parties can present evidence on both sides and call any witnesses that you want and the Court will make a decision.

THE WITNESS: Okay

THE COURT: The question is, is this your agreement?

THE WITNESS: At this time, yes, sir.

Id. at 1149.

597. See *id.* at 1148.

598. See *In re Steadman*, 670 N.E.2d at 1151-52 (citations omitted).

599.

An occasional variation on this theme arises when the wife alleges that the trial court coerced her into a bad agreement by exerting pressure to settle prior to hearing. For instance, in *Cantamessa v. Cantamessa*, 565 N.Y.S.2d 895 (N.Y. App. Div. 1991), on the day of final hearing the judge encouraged the parties to settle and consulted with the parties and their attorneys during negotiations. At the court's urging, the wife finally entered into an agreement. The wife testified that she

them get caught in a battle with their former attorneys.⁶⁰⁰ A wife may claim, for instance, that when she signed the agreement she did not know that she was entitled to half of the marital assets. Her former counsel, however, in order to protect him or herself, is likely to testify that he or she advised the wife of her right to one-half of the marital assets. Courts routinely find that the wife knew whatever the lawyer claims to have told her.⁶⁰¹ Likewise, trial courts impute negligence to the wife when her attorney fails to conduct discovery⁶⁰² or fails to detect and correct errors in

understood the settlement's terms, she had sufficient time to discuss the settlement with her attorney, and that she was satisfied with the agreement and with her attorney's representation. The court then incorporated the stipulated settlement into the final judgment of dissolution. The wife subsequently petitioned to vacate the settlement agreement. The appellate court acknowledged that the property the husband retained had substantially more value than that retained by the wife and that the agreement was "improvident." *id.* at 897. The court also noted that considerable conflict surrounded the value of the husband's ownership interest in his business, implying that discovery had yet to resolve this question despite over four years of litigation. The appellate court, however, did not recognize that this wife likely experienced what many wives experience at divorce: the refusal of the more powerful husband to comply with discovery requests, the failure of the wife's attorney's to conduct adequate discovery before negotiations "on the courthouse steps," the capitulation of the wife to the overpowering nature of the husband, his attorney, and the judge in pressured negotiations just before trial, and the wife's ultimate inability to resist pressures to enter an "improvident" agreement. Rather the court found the wife's claims of emotional stress and unsettled mental state unpersuasive grounds to set aside the stipulation, particularly when the agreement was "freely" entered into the record. Thus, no coercion. Similarly although the agreement was admittedly "improvident" – the court found it was not one-sided enough to support a finding of unconscionability.

Id.

600. *See, e.g., In re Marriage of Foster*, 451 N.E.2d 915, 917 (Ill. App. Ct. 1983).

601. *See, e.g., Bryan, supra* note 88, at 177-88; *In re Foster*, 451 N.E.2d at 917; *In re Marriage of Brandt*, 489 N.E.2d 902, 901-905, (Ill. App. Ct. 1986).

602. In a peculiar twist on this theme, one appellate court found the wife's attorney's failure to determine the status of the marital property unproblematic because an "unequivocal evaluation by the petitioner's [wife's] attorney would have been unwarranted." *In re Foster*, 451 N.E.2d at 918.

the final settlement provisions.⁶⁰³

Trial courts regularly ignore the pleas of wives who have been badly represented by lawyers chosen either by their husbands or by their husbands' attorneys.⁶⁰⁴ For instance, after several months of marital discord and talk of divorce, Lawrence Beck informed his wife Janice that he had an appointment with an attorney.⁶⁰⁵ At the meeting, the attorney persuaded Janice to sign a handwritten letter addressed to another attorney whom Janice did not know.⁶⁰⁶ The letter, which requested the attorney to represent Janice, specified the settlement terms that Janice allegedly wanted the court to include in its decree.⁶⁰⁷ At no time did Janice meet with or discuss her case with this attorney.⁶⁰⁸ Nevertheless, this attorney appeared at the final hearing without Janice and advised the court that he represented

603. See *In re Steadman*, 670 N.E.2d at 1153. In *Boyle v. Burkich*, 665 N.Y.S.2d 104 (N.Y. App. Div. 1997), the wife and husband participated in mediation. The couple's contract with the mediator stipulated that the mediator would assist the couple in developing a consensual settlement agreement, that the mediator would not provide legal advice, that the mediator would act as a neutral facilitator, and that the husband and wife should retain independent counsel. During the mediation the wife discovered that the husband was having an affair with the mediator's daughter. When the wife brought this to the mediator's attention and challenged her neutrality, the mediator told the wife to leave the daughter "out of it." The wife then proceeded with the mediation and ultimately entered a separation agreement. When the wife took the mediated agreement to her lawyer, the lawyer told the wife nothing could be done about the mediator's lack of neutrality and the agreement's seemingly unfair terms. The agreement was incorporated into the final judgment of dissolution. The wife subsequently sought to vacate the agreement, alleging that the husband and the mediator had acted in concert to fraudulently prevent full disclosure of the husband's assets and income. In upholding the trial court's refusal to vacate the agreement, the appellate court emphasized that the wife had reasonable opportunity to confer with her attorney prior to entering the agreement. No mention was made of the attorney's representations to the wife that nothing could be done about the terms of the mediated agreement or of the attorney's failure to challenge that agreement. See Telephone Interview with James W. Cooper wife's appellate counsel (Nov. 9, 1998).

604. See *In re Marriage of Beck*, 404 N.E.2d 972 (Ill. App. Ct. 1980) (reversing trial court's decision in favor of wife).

605. See *id.* at 973.

606. See *id.*

607. See *id.*

608. See *id.*

her.⁶⁰⁹ He testified that he did not know whether Janice knew what property was included in the marital estate when she signed her letter.⁶¹⁰ He further testified that the husband's attorney and the husband himself gave him the only information he had regarding the alleged oral property agreement.⁶¹¹ The husband paid the attorney fees.⁶¹² On August 29th, the court entered final judgment, incorporating the terms of the supposed oral property agreement.⁶¹³ Janice had no knowledge of the final hearing or of the final decree.⁶¹⁴ Lawrence and Janice continued living together until September 6th when Lawrence threw her out of the house and apparently refused to allow her to visit their minor daughter.⁶¹⁵ At the beginning of October, Janice consulted an attorney about visitation with her child and for the first time she learned of the divorce decree.⁶¹⁶ The trial court denied Janice's petition to vacate, but fortunately, Janice had sufficient resources to take her case to a more sympathetic appellate court that reversed the decision and remanded.⁶¹⁷

Courts find unrepresented and naive wives negligent for failing to conduct discovery, and subsequently deny their claims of fraud or misrepresentation.⁶¹⁸ For instance, when Victoria married Albert he was an experienced and successful businessman.⁶¹⁹ Their marriage lasted nineteen years before Albert's dissatisfaction with Victoria's budding business career led to his filing for divorce.⁶²⁰ The year before he sought a divorce, Albert listed his net worth on a

609. *See id.* at 973-74.

610. *See id.* at 974.

611. *See id.*

612. *See id.*

613. *See id.* at 973.

614. *See id.* at 975.

615. *See id.* at 974.

616. *See id.*

617. *See id.* at 974, 976.

618. *See, e.g., Berman v. Berman*, 629 N.Y.S.2d 82 (N.Y. App. Div. 1995) (explaining that the wife sought damages for the husband's fraudulent under-valuation of property during settlement negotiations, and the court found unpersuasive the wife's statement that she relied upon the husband's statement of net worth because the agreement stipulated that both parties voluntarily restricted discovery and the wife knew about at least one of the disputed pieces of property.)

619. *See In re Marriage of Broday*, 628 N.E.2d 790, 793 (Ill. App. Ct. 1993).

620. *See id.* at 793-94.

credit application at \$2,071,500.⁶²¹ That same year Victoria earned \$16,000 from her business.⁶²²

Albert informed Victoria that he had retained an attorney to represent him in the divorce and suggested that Victoria do the same.⁶²³ The attorney Albert chose was a friend of Albert's and of Victoria's, and had previously represented them both.⁶²⁴ According to the appellate court, Victoria "refused" Albert's advice.⁶²⁵ When Albert and Victoria first met with Albert's attorney, the attorney informed Victoria that he represented Albert and that she should retain separate counsel.⁶²⁶ Again, Victoria "refused."⁶²⁷

Albert's attorney prepared a separation agreement in which Victoria and Albert acknowledged that each had fully disclosed their respective incomes and assets, and that each had been fully informed of the other's property.⁶²⁸ The agreement provided Victoria with \$24,000 in cash, \$93,000 in her business' assets, her \$12,000 individual retirement account, and maintenance of \$2,180.56 per month over a six year period.⁶²⁹ At the divorce hearing, the court questioned Victoria about her lack of representation.⁶³⁰ Victoria replied that she had chosen to proceed pro se.⁶³¹ She also indicated her satisfaction with the agreement.⁶³² The court incorporated the agreement in the final judgment of divorce.⁶³³

Four months later Victoria consulted an attorney and petitioned the court to vacate the agreement.⁶³⁴ She claimed that Albert had failed to disclose, among other items, a \$72,480 profit sharing plan and a \$45,000 business interest.⁶³⁵ The trial court granted her petition to vacate,

621. *See id.* at 793.

622. *See id.*

623. *See id.*

624. *See id.*

625. *See id.*

626. *See id.* at 794.

627. *See id.*

628. *See id.*

629. *See id.*

630. *See id.*

631. *See id.*

632. *See id.*

633. *See id.*

634. *See id.*

635. *See id.*

but the appellate court reversed.⁶³⁶ Crucial to its holding was Victoria's failure to discover the assets that Albert had not disclosed.⁶³⁷ The court stated:

[T]he fact that Victoria could have discovered information about Albert's financial status through her own investigation or by hiring an attorney diminishes her claim of detrimental reliance on Albert's alleged misrepresentations.⁶³⁸

The appellate court then upheld the trial court's order that Albert pay a large portion of Victoria's attorney's fees, noting that Victoria lacked the financial ability to pay them herself.⁶³⁹ In justifying its position the court stated:

The record in the present case evinces a great financial disparity between the parties. As part of the divorce settlement agreement, Albert agreed to pay Victoria a \$24,000 lump sum to set up housekeeping and \$2,180.56 a month for 72 months. Victoria became aware that she had a financial problem a few months after she moved into her one bedroom apartment after the divorce since "every penny was being spent just to pay rent and electric bills and phone bills." Victoria expected to receive an inheritance of \$20,000 to \$25,000. In the meantime, the record shows that as of February 19, 1991, Victoria had only \$1,000 in her personal bank account and \$800 in her business account besides her Individual Retirement Accounts valued at \$12,000. On the other hand, Albert maintained a high standard of living which has not changed since his divorce from Victoria. His admitted net worth including real estate, personal property, marital property and what he considered as non-marital property exceeds a million dollars.⁶⁴⁰

As illustrated above, courts do not consider highly skewed property distributions one-sided enough to be unconscionable.⁶⁴¹ Sharon and James Gorman, for instance,

636. *See id.* at 793.

637. *See id.* at 795.

638. *Id.*

639. *See id.* at 798.

640. *See id.* at 797.

641. *See In re Marriage of Steadman*, 670 N.E.2d 1146, 1152-53 (Ill. App. Ct. 1996) (noting that after 19 years of marriage and five children, the wife received between 17 and 24% of the marital assets and only short-term and minimal spousal maintenance); *In re Marriage of Foster*, 451 N.E.2d 915, 919 (Ill. App. Ct. 1983) (Kasserman, J., dissenting) (noting that the husband received at least \$100,000 more than the wife); *In re Marriage of Beck*, 404 N.E.2d 972, 975 (Ill. App. Ct. 1980) (discussing that the trial court characterized the settlement as a

had been married for fourteen years when James sought a divorce.⁶⁴² Sharon signed a property settlement agreement that the trial court incorporated into its final judgment.⁶⁴³ Sharon later petitioned the court to vacate the property settlement provisions, alleging that James had coerced her into the agreement and that the terms of the agreement were so one-sided as to be unconscionable.⁶⁴⁴ According to James' figures, he received seventy-one percent of the marital assets.⁶⁴⁵ Sharon argued that he received closer to seventy-eight percent.⁶⁴⁶ The trial court found the agreement unconscionable, but the appellate court reversed, stating "[w]e find that the division of the marital property in the Agreement in the present case does not *remotely rise* to the level of unconscionability."⁶⁴⁷

The cases presented here, and many others like them, illustrate that commercial contract doctrine, particularly when applied by gender biased judges, proves insensitive to the coercive context in which women must negotiate at divorce. Under the pretense of respect for the autonomy and the equality of women, contract doctrine and its application provide no remedy and leave women mired in financial despair and resentment.

CONCLUSION

Commercial contract law should not govern the enforceability of divorce contracts. Nor should the private resolution of divorce disputes be favored without regard to fairness. Rather, courts should scrutinize settlements carefully and refuse those that are unfair.⁶⁴⁸ Judicial

"bad deal," yet denied the wife's petition to vacate); *Beattie v. Beattie*, 368 N.E.2d 178, 183 (Ill. App. Ct. 1977).

642. *See In re Marriage of Gorman*, 671 N.E.2d 819, 821 (Ill. App. Ct. 1996).

643. *See id.*

644. *See id.* at 822.

645. *See id.* at 826.

646. *See id.*

647. *Id.* at 827 (emphasis added).

648. Even some settlement proponents argue that judges should review settlements for fairness, particularly settlements requiring court approval and involving public interests. *See Menkel-Meadow, supra* note 9, at 2686. Menkel-Meadow also suggests that the substantive

rejection of unfair contracts would promote justice in individual cases and level substantially the playing field upon which divorcing women negotiate. If husbands and their attorneys know that courts routinely reject unfair agreements, they will likely offer wives better terms. In fact, many of the adversarial tactics now used to gain an advantage in divorce negotiations would prove futile,⁶⁴⁹ not only improving outcomes but lessening hostilities as well. Also, attorneys representing wives could not manipulate their unsuspecting clients into unfair settlements.

Suggesting that judges reject unfair divorce contracts, however, presupposes that judges can determine what terms are fair. As noted, indeterminate substantive laws provide little guidance. Although most trial court judges refuse to vacate most judgements under the unconscionability standard, many simultaneously acknowledge that the challenged agreements are, in fact, "bad deals." Many judges do have an intuitive sense of fairness. Gender biased judges, however, will likely continue to perceive unfair contracts as equitable. To provide guidance on what is fair and to constrain judicial bias, legislatures should enact more definitive spousal maintenance, property distribution, and child custody standards. A statute, for instance, might offer spousal maintenance guidelines and a strong presumption in their favor.⁶⁵⁰ Another statute might establish a presumption in favor of the equal distribution of the marital estate and

standards used for review should consider the interests of other likely affected by the outcome. *See id.*

649. A husband's threat of a custody claim that is designed to frighten his wife into a poor financial settlement ultimately would fail. Even if the wife agreed to the unfair settlement, the court would reject it. Over time custody threats likely would become less frequent.

650. For a more a more developed proposal of substantive reforms see PENELOPE EILEEN BRYAN, RECONSTRUCTING JUSTICE IN DIVORCE: PROCEDURAL AND SUBSTANTIVE REFORM (unpublished manuscript, on file with author); see also A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATION (Tentative Draft No.2, 1996).

specify limited circumstances that might justify deviation.⁶⁵¹ A third might create a primary caretaker presumption with specified exceptions.

Lack of information about the parties' respective financial positions might also compromise a judge's ability to determine whether an agreement is fair. A strongly enforced requirement that both parties submit specified financial information to each other and to the court well before final hearing would facilitate judicial review.⁶⁵²

Obviously, requiring judges to review all divorce agreements threatens to consume substantial judicial time. To lessen the time needed for review, parties who plan to submit divorce contracts for judicial approval should be required to file, in addition to the aforementioned financial affidavit, a pre-hearing settlement statement. The pre-hearing statement should illustrate how the proposed contract complies with relevant law. If the contract terms do not reflect the law, the statement should so note and should contain a justification for the deviation. If parties fail to submit a financial disclosure affidavit or a pre-hearing statement, the judge should refuse to hear the divorce.

Judges should also abandon their reluctance to set aside or vacate agreements that, upon closer observation, seem unfair. Conceivably, judges may make mistakes in reviewing divorce contracts at a final hearing. If one party, within a reasonable period of time, brings an error to the court's attention, the court should correct it. Moreover, if a party has failed, for whatever reason, to list an asset or to accurately reflect income on the mandatory financial disclosure affidavit, the court should readily adjust the divorce contract's terms. Adjustment alleviates injustice in individual cases and encourages the candor necessary to

651. See BRYAN, *supra* note 650; see also A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATION (Tentative Draft No.2, 1996).

652. For a more a more extensive proposal for procedural reforms see BRYAN, *supra* note 650.

reach fair results in all cases.

The above suggestions substantially restrict the freedom of divorcing parties to contract. Restriction, however, seems justified by the coercive context in which wives must negotiate and the dysfunctional results produced by a free-market approach to divorce. Moreover, insistence on fair divorce contracts offers to enhance women's autonomy and equality by improving their financial positions and broadening their life choices.

